No. _____

In The
Supreme Court of the United States

LAURA ESTELA SALAZAR-REGINO
and NOHEMI RANGEL-RIVERA,

Petitioners,

v.

MARC MOORE, REGIONAL DIRECTOR,
DEPARTMENT OF HOMELAND SECURITY, BUREAU
OF IMMIGRATION AND CUSTOMS ENFORCEMENT,

and

ALBERTO R. GONZALES,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Fifth and Eighth Circuits[1] have held that state felony convictions for drug offenses which contain no trafficking element are "aggravated felonies" for purposes of the immigration laws, notwithstanding that such offenses would be punishable as misdemeanors under the Controlled Substance Act, (21 U.S.C. §951 *et seq.*). This holding conflicts with rulings from the Second, Third, Sixth, and Ninth Circuits, and with a line of decisions spanning ten years from the Board of Immigration Appeals ("BIA" or "Board"), which the Board abandoned as a result of this circuit conflict.

The question presented is as follows: Does the definition of "aggravated felony" found at 8 U.S.C. §1101(a)(43)(B) include a state conviction for possession of a controlled substance, where the offense contains no trafficking element and would be punishable only as a misdemeanor under the Controlled Substances Act, ("CSA"), but is classified as a felony under state law?

[1] A petition for writ of certiorari is pending in the Eighth Circuit case, which presents the same issue as involved herein, *Lopez v. Gonzales*, No. 05-547. *See also*, pending petitions for certiorari to the Fifth Circuit in *Toledo-Flores v. United States*, 05-7664, and *Mendoza-Torres v. United States*, 05-7496, both of which involve the same issue, in the context of the United States Sentencing Guidelines, ("USSG"), and in *Sanchez-Villalobos v. United States*, No. 05-484, wherein the Fifth Circuit held that a second state misdemeanor conviction for possession of a controlled substance is an aggravated felony, because it would be treated as a felony under federal law.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioners Laura Estela Salazar-Regino and Nohemi Rangel-Rivera were the Respondents before the Executive Office for Immigration Review, and the Petitioners in the District Court, and before the Fifth Circuit Court of Appeals. The cases of seven other similarly situated individuals which were consolidated by the District Court with those of the Petitioners herein were severed by the Court of Appeals, and are proceeding independently. The Respondents in the District Court and before the Fifth Circuit were the United States Attorney General, and the Immigration and Naturalization Service, ("INS"), (now, part of the Department of Homeland Security). In accordance with Rule 35, Rules of the Supreme Court, the name and title of the official of the Department of Homeland Security has been substituted for those who occupied the corresponding office of the INS when the actions were initiated in the United States District Court. The INS was also the prosecuting agency before the Executive Office for Immigration Review, which Office is under the charge of Respondent the United States Attorney General.

REFUGIO DEL RIO GRANDE, Inc., which is filing the instant petition on behalf of Petitioners, is a not for profit, Section 501(c)(3) corporation. It has no stock, and no parent corporation.

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I. PETITION FOR WRIT OF CERTIORARI

Laura Salazar-Regino and Nohemi Rangel-Rivera respectfully petition this Honorable Court for a writ of certiorari to review the judgment issued in their case by the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit, joined by the Eighth, but in conflict with the Second, Third, Sixth, and Ninth Circuits, holds that a state drug offense containing no trafficking element which is a felony under state law, but would be punishable as a misdemeanor under federal law, is an aggravated felony under the immigration laws. In the instant case, the Court also held that it is not unconstitutional to apply this holding retroactively, even where it dramatically increases the immigration consequences of a fully executed plea bargain.

II. OPINIONS BELOW

The decision of the Fifth Circuit herein was reported at *Salazar-Regino v. Trominski et al.*, 415 F.3d 436 (5th Cir. 2005), Appendix ("App."), *infra,* at 1.[2] Neither the District Court decision, App., *infra*, at 28, nor the Report and Recommendation of the United States Magistrate Judge, App., *infra*, at 59, was published. The BIA's decision in the case of Petitioner Salazar-Regino, App., *infra*, at 108, was published at *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002). The BIA decision in the case of Petitioner Rangel-Rivera, App., *infra*, at 162, was unpublished, as were the decisions of the Immigration Judges in

[2] The Court has since withdrawn the mandate with respect to the other seven petitioners initially involved therein.

both cases, App., *infra*, at 158 (Salazar-Regino) and 165 (Rangel-Rivera).

III. JURISDICTION

The judgment of the Fifth Circuit was entered June 30, 2005, App. *infra*, at 1. Petitioners' timely petition for *en banc* rehearing was denied September 27, 2005. App., *infra*, at 174. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

IV. STATUTORY PROVISIONS INVOLVED

Four statutory provisions are involved: 8 U.S.C. §1101(a)(43)(B), App., *infra*, at 178; 8 U.S.C. §1229b(a); 18 U.S.C. §924(c), App., *infra*, at 179; and Texas Health and Safety Code §481.121(a).

8 U.S.C. §1101(a)(43)(B)

8 U.S.C. §1101(a)(43):

(43) The term "aggravated felony" means –

(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act [21 U.S.C. § 802]), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);

. . .

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the

term of imprisonment was completed within the previous 15 years. . . .

8 U.S.C. §1229b(a)

1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents. The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

18 U.S.C. §924(c)(2)

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

Texas Health & Safety Code §481.121(a)

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly

or intentionally possesses a usable quantity of marihuana.

V. STATEMENT OF THE CASE

Petitioners seek review of the Fifth Circuit's holding that a state drug conviction that has no trafficking element and would be punishable as a misdemeanor under the Controlled Substances Act, but is treated as a felony by the state, is an "aggravated felony" under the immigration laws.

Any non-citizen convicted of an offense relating to a controlled substance, other than a single conviction for possession for personal use of thirty grams or less of marijuana, is deportable. 8 U.S.C. §1227(a)(2)(B)(I). A non-citizen convicted of an aggravated felony is also deportable, 8 U.S.C. §1227(a)(2)(A)(iii).

Lawful permanent residents, ("LPRs"), who are deportable due to drug convictions may apply for cancellation of removal under 8 U.S.C. §1229b(a) if they meet three conditions. They must: (1) have been a lawful permanent resident for not less than five years; (2) have resided continuously in the United States for not less than seven years following a lawful admission; and (3) not have been convicted of an aggravated felony. *Id.* Except for those who qualify for relief under (prior) Section 212(c) of the Immigration and Nationality Act, ("INA"), as a result of *INS v. St. Cyr*, 533 U.S. 289, 323-24 (2001), any non-citizen who is deportable under *both* 8 U.S.C. §§1227(a)(2)(B)(I) and 1227(a)(2)(A)(iii) is subject to mandatory removal, ineligible for any form of relief, and permanently barred from returning. Thus, if Petitioners' convictions are held to be aggravated felonies, they face

mandatory deportation, permanent exile, 8 U.S.C. §1182(a)(2)(A)(i)(II), and criminal sanctions of up to twenty years in prison for illegal reentry, 8 U.S.C. §1326(b)(2).

A. "AGGRAVATED FELONY" AND "DRUG TRAFFICKING CRIME"

Determining the meaning of "aggravated felony" as applied to drug offenses requires navigating what has been described as "a rather confusing maze of statutory cross-references." *United States v. Palacios-Suarez*, 418 F.3d 692, 694 (6th Cir. 2005). The INA defines "aggravated felony" as "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." 8 U.S.C. §1101(a)(43)(B). It further provides that the term applies to an offense "whether in violation of Federal or State law." *Id.* at §1101(a)(43).

This creates two categories of drug convictions that are aggravated felonies: State or federal offenses involving "illicit trafficking" in a controlled substance, (which provision is not at issue herein), and any offense that is a "drug trafficking crime" within the meaning of 18 U.S.C. §924(c). In turn, 18 U.S.C. §924(c)(2) defines "drug trafficking crime," as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*)" and two other federal statutes, (which are also not involved herein).

B. THE TWO COMPETING APPROACHES

The issue presented herein is one on which the circuits are divided: namely, whether "any felony punishable

under the Controlled Substances Act . . . " includes a state felony drug conviction that does not contain a trafficking element, and would be punishable only as a misdemeanor under federal law. There are two competing interpretations: the so-called "hypothetical federal felony" approach, initially adopted by the Board of Immigration Appeals in *Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990), and the "Guidelines approach," which the Fifth Circuit adopted in *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997).

As explained in *Liao v. Rabbett*, 398 F.3d 389, 391 (6th Cir. 2005), the "hypothetical federal felony" approach "reads the phrase 'any felony punishable under the CSA' to mean any conviction *punishable as a felony* under the CSA." Under the "Guidelines approach," as the Fifth Circuit concluded in *Hinojosa-Lopez*, 130 F.3d at 694, "the defendant's prior state conviction for simple possession of cocaine qualified as an aggravated felony," because it satisfied two elements: 1) it was punishable under the CSA, and 2) it was a felony under either state or federal law.

The Fifth and Eighth Circuits found that the "plain language" requires application of the Guidelines approach, and consequently neither applied the presumption of *Jerome v. United States*, 318 U.S. 101 (1943) (holding that the phrase "any felony" in a federal statute presumptively refers only to offenses which would be felonies under federal law), nor considered evidence of Congressional intent. The Third and Sixth Circuits have found that the statutory language supports both readings, and on examining the historical context, and applying the presumption in favor of uniformity, have followed the "hypothetical federal felony" approach initially adopted by the BIA,

holding that such offenses are not aggravated felonies.[3] The Second and Ninth Circuits hold that they are not aggravated felonies in the immigration context, but are aggravated felonies for purposes of the Sentencing Guidelines, ("USSG").[4] Four other Circuits have found such offenses to be aggravated felonies under the USSG, but have not addressed the issue in the immigration context.[5]

C. THE FACTUAL AND PROCEDURAL BACKGROUND

Petitioners Laura Salazar-Regino and Nohemi Rangel-Rivera are Mexican nationals who came to the United States at early ages: Ms. Salazar was six; Ms. Rangel, fourteen. They have extensive family ties in the United States, including minor United States citizen children. Both pled guilty to felony charges of possessing marijuana in violation of Texas Health & Safety Code §481.121(a), in exchange for rehabilitative treatment; "deferred adjudication," under Texas Code of Crim. Proc., Art. 42.12, Sec. 5. App., *infra* at 63-64,90-92, which offenses would have been misdemeanors under federal law. Both have otherwise clean records. At the time of Ms. Salazar-Regino's 1997 plea, BIA precedent held that deferred adjudication was not a

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[3] *See, Gerbier v. Holmes*, 280 F.3d 297 (3rd Cir. 2002); *United States v. Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005).

[4] *See, Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996); *United States v. Pornes-Garcia*, 171 F.3d 142 (2nd Cir. 1999); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004); *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1339-40 (9th Cir. 2000).

[5] *United States v. Wilson*, 316 F.3d 506, 512 (4th Cir. 2003); *United States v. Simon*, 168 F.3d 1271, 1272 (11th Cir. 1999); *United States v. Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir. 1996); and *United States v. Restrepo-Aguilar*, 74 F.3d 361, 364 (1st Cir. 1996).

"conviction" for immigration purposes. By the time of Ms. Rangel-Rivera's plea, in 1999, it was considered a conviction, but not an aggravated felony.[6]

In both cases, the Immigration Judges, ("IJs"), issued decisions in Petitioners' favor. Proceedings against Ms. Salazar-Regino were terminated on the basis of *Matter of Manrique, supra.* In Ms. Rangel-Rivera's case, the IJ granted cancellation of removal, and then terminated proceedings. App., *infra*, at 158, 165. INS appealed both decisions. The BIA reversed both decisions, on the basis of *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001), and ordered Petitioners removed. App., *infra*, at 108, 162. Both Petitioners sought relief in habeas corpus, 28 U.S.C. §2241. As the District Court summarized the cases, App., *infra*, 31-32:[7]

> At the time of entering their guilty pleas, all Petitioners were lawful permanent residents. . . . All Petitioners pled guilty in state courts to offenses involving simple possession of a controlled substance, Several petitioners received deferred adjudication, . . . and others received punishment

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[6] *See, Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995) (holding that for policy reasons, rehabilitative disposition of a first-time offense for possession of a controlled substance would not be treated as a conviction). In *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), decided shortly before Ms. Rangel-Rivera's plea, the BIA abrogated *Matter of Manrique*. *See also, Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995) (confirming earlier BIA decisions adopting the so-called "hypothetical federal felony test" for determining whether a state drug conviction was an aggravated felony.

[7] Initially, nine cases were consolidated. Seven were severed at the Fifth Circuit, and are trailing the case at bar.

> consisting of probation. At the time Petitioners entered their plea agreements, their offenses under state rehabilitative statutes were not, as a matter of BIA policy, considered convictions if the aliens met certain requirements. Additionally, their offenses of simple possession of a controlled substance were not considered to be aggravated felonies under the INA. Nevertheless, as a result of changes in the law after Petitioners pled guilty, . . . the INS later initiated removal proceedings on the basis of these convictions. Because the Petitioners' offenses of simple possession are classified as aggravated felonies, Petitioners are each ineligible to apply for cancellation of removal under the relief established in 8 U.S.C. §1229b(a)(3) (providing aliens convicted of aggravated felonies are ineligible for cancellation of removal).

The District Court denied all relief, App., *infra*, at 32, and Petitioners appealed to the Fifth Circuit, under 28 U.S.C. §1291.

D. FIFTH CIRCUIT PRECEDENT AND THE DECISION HEREIN

The Fifth Circuit first held that state felony drug convictions were aggravated felonies in the context of the Sentencing Guidelines in *Hinojosa-Lopez*, 130 F.3d at 693-94:

> Although this is an issue of first impression before this court, it has been addressed by several other circuits. In United States v. Restrepo-Aguilar, 74 F.3d 361 (1st Cir.1996), the First Circuit held that the defendant's prior state conviction for simple possession of cocaine qualified as

> an aggravated felony under §2L1.2(b)(2) despite the fact that the same offense was punishable only as a misdemeanor under federal law. Id. at 364-65. Looking to the interaction between the Sentencing Guidelines and the applicable federal statutes, the court held that 18 U.S.C. §924(c)(2) defines a "drug trafficking crime" as "encompassing two separate elements: (1) that the offense be punishable under the Controlled Substances Act (or one of the other two statutes identified); and (2) that the offense be a felony." Id. at 364. The court then explained that a state drug offense is properly deemed a "felony" within the meaning of 18 U.S.C. §924(c)(2) as incorporated by application note 7 to U.S.S.G. s 2L1.2, if the offense is classified as a felony under the law of the relevant state, even if the same offense would be punishable only as a misdemeanor under federal law. Id. at 365. As the defendant's prior conviction was a felony under applicable state law and was punishable under the Controlled Substances Act, the court held that s 2L1.2(b)(2) applied. Id.

The Court further justified this result on the basis of the "plain" meaning of the phrase "any felony punishable under [the CSA]," and extended it to immigration cases in *Hernandez-Avalos*, 251 F.3d at 510:

> [T]he plain language of the statutes "indicate[s] that Congress made a deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the [Controlled Substances Act]," *Briones-Mata*, 116 F.3d at 310, and that the lack of a uniform substantive test for determining which drug offenses qualify as "aggravated felonies" "is the consequence of a deliberate policy choice by Congress" that the BIA and the

> courts cannot disregard. *Restrepo-Aguilar*, 74 F.3d at 366.

Having found a "plain meaning," the Court did not apply the presumption of *Jerome v. United States, supra*, and its progeny. Nor did the Court consider the phrase in context, or examine the history of 8 U.S.C. §1101(a)(43)(B) or 18 U.S.C. §924(c) for evidence of Congressional intent.[8]

In the instant case, Petitioners argued that Texas deferred adjudication for possession of marijuana was not a conviction for an "aggravated felony," and that retroactive application of *Hernandez-Avalos* to them would deprive them of Due Process. Citing cases such as *INS v. St. Cyr*, 533 U.S. at 323-24 (statutory changes that retroactively affected plea bargains deprived LPRs of "fair notice"), and *BMW v. Gore*, 517 U.S. 559, 574-75 (1996) (finding Due Process violation where there was no "fair notice" of the scope of possible civil penalties for misconduct), they urged the Court to find a denial of procedural Due Process. They also argued that their substantive Due Process rights were abridged, on the theory that they had both liberty interests and property rights in remaining with their families in the United States, and that the statutes depriving them of the opportunity to even *request* relief operated as a conclusive presumption that they were unworthy of exercising those rights, much like those which

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[8] One might infer that the command in *Jerome* that a Court look for evidence of Congressional intent as to uniformity requires *some* examination of the legislative history, and on finding indications that Congress *did* intend uniformity, a more in-depth analysis of the statutory language to see if it could support a construction consistent with that intent.

have been found to violate Due Process in cases like *Stanley v. Illinois*, 405 U.S. 645 (1972).

The Fifth Circuit found the offenses to be aggravated felonies, and dismissed Petitioners' appeal. App., *infra*, at 3. The panel held that any challenge to *Hernandez-Avalos* was "foreclosed by our obligation to follow the prior panel opinion," *Salazar-Regino*, 23 I&N Dec. at 448; App., *infra*, at 19. The panel also rejected their "fair notice" argument under *BMW v. Gore*, and *St. Cyr*, which it characterized as "nothing more than an argument that the rulings should not be applied retroactively because of reliance interests," *id.* at 450; App., *infra*, 23. Petitioners' request for *en banc* rehearing, mounting a frontal challenge to both *Hinojosa-Lopez* and *Hernandez-Avalos*, was denied without comment. App., *infra*, at 176.

VI. REASONS FOR GRANTING THE WRIT

A. THE APPROACH OF THE FIFTH CIRCUIT CONFLICTS WITH THAT OF THE SECOND, THIRD, SIXTH AND NINTH CIRCUITS

As shown above, the approach of the Fifth Circuit is premised on its finding that there is only one "plain meaning" of the statutory language involved. Consequently, the Court has declined to look for evidence of Congressional intent in the history of either 8 U.S.C. §1101(a)(43)(B) or 18 U.S.C. §924(c). Other Courts, notably the Third and Sixth Circuits, have found that the operative language of 18 U.S.C. §924(c)(2) ("any felony punishable under [the CSA]"), supports two interpretations. In effect, the Sixth Circuit found in *Palacios-Suarez* that it had not one, but *two* "plain" meanings: "[E]ither the 'hypothetical federal

felony' interpretation or the 'guideline approach' could be supported by the plain meaning of the statute," *id.* at 698. Similarly the Court in *Gerbier* noted the two approaches. Both Courts resolved the conflict in favor of the "hypothetical federal felony" test.

Nor does the conflict among the circuits end there. Based largely on the presumption favoring uniformity in the administration of the immigration laws, and the absence of any indications of a contrary intent, the Ninth Circuit concluded in *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d at 910-18, that for immigration purposes, it would follow the approach of the Third Circuit, notwithstanding that it had reached a contrary conclusion in the context of the Sentencing Guidelines, *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1339-40 (9th Cir. 2000) (holding that a state drug felony can be an aggravated felony for Sentencing Guidelines purposes, even if the same conduct would not constitute a felony under federal law). In *United States v. Fernandez*, 388 F.3d 1199 (9th Cir. 2004), the Court explained its dual approach, *id.* at 1259, n.44, noting that:

> [T]he need for national uniformity is not as compelling in the context of criminal law – which has been traditionally a subject of state law – as it is in other contexts which are regulated primarily by the federal government.

The twists in Second Circuit precedent are even more complex, and were resolved by a similar decision, concluding that such an offense is an aggravated felony under the USSG, but not for purposes of the immigration laws. *United States v. Pornes-Garcia*, 171 F.3d 142 (2nd Cir. 1999).

This Court regularly grants certiorari to resolve circuit conflicts over the meaning of the immigration laws. *See, e.g., Fernandez-Vargas v. Gonzales* (No. 04-1376), cert. granted October 31, 2005; *Clark v. Martinez*, 125 S.Ct. 716, 722 (2005); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *Demore v. Kim*, 538 U.S. 510, 516 (2003). *See also*, Rules of the Supreme Court, Rule 10(a). Moreover, the impact on LPRs such as the Petitioners herein is profound. *See, Bridges v. Wixon*, 326 U.S. 135, 145 (1945) (emphasis added):

> Here the liberty of an individual is at stake. . . . Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty – at times a most serious one – cannot be doubted. *Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.*

Nor is the number of individuals affected by the issue trivial. In the Fifth Circuit alone, the cases of at least thirty similarly situated LPRs are trailing the one at bar. This includes the seven individuals initially consolidated with Petitioners herein, twelve consolidated cases in *Martinez-Lopez v. Gonzales*, No. 05-60503, and numerous others. Further, as in *Leocal v. Ashcroft, supra*, the issue is also presented in the context of the Sentencing Guidelines, ("USSG"). As noted above, note 1, *supra*, at least four petitions for certiorari presenting the same or related

issues are already pending, including three to the Fifth Circuit involving cases decided under the USSG.[9]

B. THE APPROACH OF THE FIFTH CIRCUIT CREATES GREAT DISPARITIES IN THE ADMINISTRATION OF THE IMMIGRATION LAWS

The decisions of the Fifth – and Eighth – Circuits do not seriously attempt to reconcile their holdings with the longstanding policy of ensuring uniform application of the immigration laws. Their approach causes huge disparities – and inequities – in the administration of the immigration laws. Under that approach, noncitizens convicted of like offenses may be subject to different rules for asylum,[10] naturalization,[11] cancellation of removal,[12] and many other aspects of immigration law, simply because their convictions occurred in different states.[13] These inequities have

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[9] *Sanchez-Villalobos v. United States*, No. 05-484, *Toledo-Flores v. United States*, 05-7664, and *Mendoza-Torres v. United States*, 05-7496.

[10] An applicant who has been convicted of an aggravated felony is ineligible for asylum. 8 U.S.C. §1158(b)(2)(B)(i).

[11] An LPR convicted of an aggravated felony on or after November 29, 1990 is ineligible for naturalization. 8 U.S.C. §1427(a). *See also*, Immigration Act of 1990, §509 (conviction of aggravated felony as a bar to showing good moral character applies to convictions entered on or after effective date of amendment).

[12] 8 U.S.C. §1229b(a)(3) (LPRs convicted of aggravated felonies are ineligible for cancellation of removal).

[13] For example, in Texas, possession of any "visible and measurable" amount of cocaine is a felony. Texas Health & Safety Code §§481.102(3)(D) and 481.115; *Kemp v. State*, 861 S.W.2d 44 (App. 14 Dist. 1993) ("specks" of white powder in baggie, weighing .5 milligrams, sufficient to sustain a conviction). By contrast, as noted in *Shackleford v. State*, 261 Ark. 721, 722 (Ark. 1977), possession of cocaine is only a misdemeanor under Ark. Stat. Ann. §82-2617.

constitutional dimensions. As noted in *Gerbier*, 280 F.3d at 311:

> As Alexander Hamilton wrote, the power over naturalization must "necessarily be exclusive; because if each State had power to prescribe a Distinct Rule there could be no Uniform Rule." The Federalist No. 32 (Alexander Hamilton). Indeed, the policy favoring uniformity in the immigration context is rooted in the Constitution. *See* U.S. Const. art. I, § 8 ("The Congress shall have the Power To . . . establish a uniform Rule of Naturalization.")

Congress expressly recognized the policy of uniformity in the immigration laws when it enacted the Immigration Reform and Control Act of 1986, stating: "It is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously and uniformly." P.L. No. 99-603 § 115, 100 Stat. 3359, 3385 (1986). The courts of appeals have often recognized the importance of uniform enforcement of the immigration laws. *See, e.g., Jaramillo v. INS*, 1 F.3d 1149, 1166 (11th Cir. 1993):

> The laws that we administer and the cases we adjudicate often affect individuals in the most fundamental ways. We think that all would agree that to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide. . . .

See also, Cazarez-Gutierrez, 382 F.3d at 912; *Gerbier*, 280 F.3d at 299; *Aguirre*, 79 F.3d at 317; *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994) ("National uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so

pronounced as in the laws that determine who may cross our national borders and who may become a citizen").

C. THE "PLAIN MEANING" APPROACH OF THE FIFTH CIRCUIT OVERLOOKS THE CLEAR EVIDENCE THAT CONGRESS DID NOT INTEND FOR VARIATIONS IN STATE LAW TO UNDERMINE THE UNIFORM ENFORCEMENT OF THE IMMIGRATION LAWS

1. The "Plain Meaning"

The Fifth Circuit's construction of §1101(a)(43)(B) initially arose in the context of the USSG. It was based on a conclusion that the phrase "any felony punishable under [one of three federal statutes]" had a "plain" meaning, because of the manner in which the Controlled Substances Act defines "felony." *See, United States v. Hernandez-Avalos*, 251 F.3d at 509-510. Having found a single "plain meaning," the Fifth Circuit neither applied the *Jerome* presumption in favor of uniformity, nor examined the history of §924(c) and §1101(a)(43)(B) to determine whether Congress actually *intended* uniformity. Nor did that Court consider the analysis underlying the BIA's contrary interpretation.[14]

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[14] As the Court reasoned in *Hernandez-Avalos*, 251 F.3d at 509, n.3:

> Because the question presented by this appeal relates only to the fundamental fairness of the proceeding, we need not consider Hernandez's argument that we must defer to the BIA's interpretation of these general criminal statutes.

2. The Context

As this Court noted in *Leocal v. Ashcroft*, 125 S.Ct. at 382, statutory language must be construed "in its context and in light of the terms surrounding it."[15] It is therefore significant that §1101(a)(43)(B) references *all of* §924(c), *not just* §924(c)(2). Thus, at a minimum, the remainder of §924(c) provides *context* for the definition of "drug trafficking" as an aggravated felony, to wit, drug trafficking offenses involving the carrying or use of deadly weapons during the commission of the crime. This, plus the ordinary meaning of the terms used in §1101(a)(43)(B), which defines an *aggravated* felony involving *trafficking* in controlled substances, rather than just *any* such felony, including simple possession, indicates that it was intended to apply only to serious offenses bearing some relationship to drug trafficking. Isolating the term "felony" in §924(c), and construing it by reference to the definition of "felony" in one of the three federal statutes involved, rather than in its context, and without considering the legislative history, has produced an absurd result: even remedial dispositions of first time charges of possession of a controlled substance are considered "drug trafficking" offenses, and thus *aggravated* felonies. Further, examination of the historical *context* of both 18 U.S.C. §924(c)(2), and 8 U.S.C. §1101(a)(43) shows that this was not the result intended by Congress. *See*, *infra* at VI(C)(4) and (5).

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[15] *See also, Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

3. Under *Jerome v. United States*, 318 U.S. 101 (1943), The Phrase "Any Felony" In §924(C)(2) Presumptively Refers Only To Offenses Which Would Be Felonies Under Federal Law

Jerome v. United States, supra, involved a situation almost identical to that of Petitioners. The statute at issue therein, §2(a) of the Bank Robbery Act (12 U.S.C. §588b (1943)), provided that:

> [W]hoever shall enter or attempt to enter any bank, or any building used in whole or in part as a bank, with intent to commit in such bank or building, or part thereof, so used, any felony or larceny, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

The defendant was convicted under this statute for entering a bank with the intent to defraud it by uttering a forged promissory note: a felony under state, but not federal, law. This Court held that the statutory phrase "any felony" referred only to offenses which would be felonies under federal law. As the Court reasoned, *id.* at 104-105 (internal citations omitted) (emphasis added):

> At times it has been inferred from the nature of the problem with which Congress was dealing that the application of a federal statute should be dependent on state law. . . . But we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law.

As the Third and Sixth Circuits concluded in *Gerbier*, and *Palacios-Suarez*, the histories of §924(c)(2) and §1101(a)(43)(B) are not only devoid of any indication that Congress

intended the definition of "felony" to depend on state law, they affirmatively show the contrary. This history has yet to be considered by the Fifth Circuit.

4. The History Of 18 U.S.C. §924(c)

Previously, §924(c)(2) defined drug trafficking crime as "any *felony violation of Federal law* involving the distribution, manufacture, or importation of any controlled substance (as defined in [21 U.S.C. § 802])." P.L. No. 99-308 §104(a)(2)(F), 100 Stat. 449, 457 (1986) (emphasis added). The current definition was enacted by the Anti-Drug Abuse Act of 1988, in a provision entitled "***Clarification** of Definition of Drug Trafficking Crimes*." P.L. No. 100-690 §6212, 102 Stat. 4181, 4360 (1988) (emphasis added). That *clarification* simply specified which federal statutes qualify as "drug trafficking crime[s]." Where the prior definition spoke in general terms about "Federal law involving the distribution, manufacture, or importation of any controlled substance," P.L. No. 99-308 §104(a)(2)(F) (1986), 100 Stat. at 457, the new language clarified that §924(c) applies only to violations of three specific statutes: the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), and the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).[15] As observed in *Palacios-Suarez*, 418 F.3d at 699, (quoting *Cazarez-Gutierrez*, 382 F.3d, at 915):

> [T]here is nothing in the legislative history [of 18 U.S.C. §924(c)] to suggest that Congress intended this "clarification" to dramatically widen the scope of "drug trafficking crime" to include

[15] P.L. No. 100-690 §6212, 102 Stat. at 4360 (1988).

> simple drug possession offenses that would not be punishable as felonies under federal law.

The Third Circuit reached the same conclusion in *Gerbier*, 280 F.3d, at 308-309.

5. The History Of 8 U.S.C. §1101(a)(43)(B)

The history of 8 U.S.C. §1101(a)(43)(B) also confirms that Congress did not intend the construction adopted by those circuits, including the Fifth and Eighth, which have adopted the so-called "Guidelines approach." The Immigration and Nationality Act was amended by the Anti-Drug Abuse Act of 1988 to add several provisions relating to aliens convicted of aggravated felonies,[16] which was then defined as follows:

> The term "aggravated felony" means murder, any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title, or any attempt or conspiracy to commit any such act, committed within the United States.

In *Matter of Barrett*, the issue arose of whether this included state convictions which would be punishable as felonies under 18 U.S.C. §924(c)(2). The alien therein had been convicted by the State of Maryland of three types of drug offenses. The IJ held that because they were state convictions, none was an aggravated felony. INS appealed, arguing that the counts charging *possession with intent* were aggravated felonies. *Barrett*, 20 I&N Dec. at 173.

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[16] P.L. No. 100-690, 102 Stat. 4181 (1988).

The BIA concurred, concluding, *id.* at 175 (emphasis added), that:

> If Congress had wanted only convictions under the cited federal statutes to serve as aggravated felonies with respect to drug offenses, it could have said so quite simply. Instead Congress referred to felonies "punishable under" not "convictions obtained under" those statutes. As such, we find that the definition of "drug trafficking crime" at 18 U.S.C. § 924(c)(2), as incorporated into the Immigration and Nationality Act by section 101(a)(43) of the Act, **includes a state conviction sufficiently analogous to a felony offense under the Controlled Substances Act**, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act.

Among the factors considered in reaching this conclusion was the INS' argument favoring uniform administration of the immigration laws. *Id.* at 176, n.7.

Shortly after *Barrett* was decided, Congress added language to §1101(a)(43) specifying that it applied to "an offense described in this paragraph whether in violation of Federal or State law." As explained by the House Judiciary Committee (emphasis added):[17]

> Current law clearly renders an alien convicted of a Federal drug trafficking offense an aggravated felon. It has been less clear whether a state drug trafficking conviction brings that same result, *although the Board of Immigration Appeals in*

[17] H.R. Rep. No. 101-681, pt. 1, at 147 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6553.

> *Matter of Barrett (March 6, 1990) has recently ruled that it does. Because the Committee concurs with the recent decision of the Board of Immigration Appeals* and wishes to end further litigation on this issue, section 1501 of H.R. 5269 specifies that drug trafficking (and firearms/destructive device trafficking) is an aggravated felony whether or not the conviction occurred in state or Federal court.

This amendment ensured that the definition applied to *felony* offenses *described by* the pertinent federal statutes, whether prosecuted by federal, or state, authorities.

6. The Construction Urged Herein Is Also Mandated By The Rule On Lenity, The Vagueness Doctrine, And The Maxim Of Constitutional Avoidance

The profound split among the circuits reveals a degree of ambiguity in the statutes at issue. As noted in *Leocal*, 125 S.Ct. at 384, statutes carrying both criminal and immigration consequences are subject to the rule on lenity, "Even if [18 U.S.C.] § 16 lacked clarity on this point, we would be constrained to interpret any ambiguity in the statute in petitioner's favor." *See also, INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (holding that any "lingering ambiguities" in a deportation statute must be resolved in the alien's favor). Further, as held in *Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951), the vagueness doctrine applies to deportation statutes, "in view of the grave nature of deportation." The maxim of constitutional avoidance also supports the result urged herein – in that, as urged before the Court of Appeals, a contrary construction would

violate both Substantive and Procedural Due Process.[18] *See*, App., *infra* at 19-26.

D. THE QUESTION PRESENTED WILL NOT BENEFIT FROM FURTHER CONSIDERATION IN THE COURTS OF APPEALS

To date, six circuits have addressed the issue of whether a state law felony that would be punishable as a misdemeanor under federal law is a "drug trafficking crime" under 18 U.S.C. §924(c)(2) for purposes of the immigration laws. Four have concluded that it is not such an offense, while two have held that it is. Four other circuits have considered the question in the context of the Sentencing Guidelines. *See supra*, Notes 3, 4 & 5.

The BIA has also considered various facets of the issue. Beginning with *Matter of Barrett, supra*, they consistently followed the "hypothetical federal felony" approach, until forced to change course as the courts of appeals reached different conclusions. *See, In re Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002) (recognizing that "uniformity is presently unattainable"); *In re K-V-D-*, 22 I&N Dec. 1163 (BIA 1999); *In re L-G-, supra*; *In re Davis*, 20 I&N Dec. 536 (BIA 1992); *Matter of Barrett, supra*.

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[18] It is beyond dispute that deportation implicates liberty interests. *See, Bridges v. Wixon, supra*. *See also, Landon v. Plasencia*, 459 U.S. 21, 32 (1982):

> This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.... [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."

The decisions of the courts of appeals and the BIA have examined the text of the statutes in question, their legislative history, and policy considerations favoring uniformity in enforcing the immigration laws. Further decisions are thus unlikely to yield significant new analysis. The circuits have staked out their positions, and framed the issue for this Court's resolution. The Fifth Circuit, for example, initially concluded that state felony drug convictions lacking a trafficking element were aggravated felonies in 1997, in *Hinojosa-Lopez, supra.* Since then, the Court has repeatedly declined to reconsider the issue *en banc*, and there is no reason to believe that it will do so in the future. Rather, the Fifth Circuit appears to be awaiting guidance from this Court, and, for example, continues to grant (unopposed) motions to stay deportation in such cases until "the final mandate is issued after all proceedings in *Salazar-Regino et al. v. Trominski* case are concluded." *See*, Order dated December 9, 2005, in *Aguilar-Adame v. Gonzales*, No. 05-60627, (5th Cir. pending) (available on PACER).

VII. CONCLUSION

For the foregoing reasons, it is respectfully urged that this Court issue a writ of certiorari to the Fifth Circuit, to resolve the conflict among the circuits on this crucial point of law, and to relieve Petitioners, and dozens if not hundreds of similarly situated LPRs of the extreme consequences wrought by that Court's incorrect interpretation of the law. Resolution of this conflict is particularly urgent

in that it affects the application of both the immigration laws, and the United States Sentencing Guidelines.

Respectfully submitted,

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No. 03-41492

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

415 F.3d 436; 2005 U.S. App. LEXIS 13110

June 30, 2005, Filed

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JUDGES: Before JOLLY, SMITH, and DEMOSS, Circuit Judges.

OPINION BY: JERRY E. SMITH

OPINION: JERRY E. SMITH, Circuit Judge:

The petitioners are lawful permanent resident aliens who pleaded guilty to marihuana possession offenses and received deferred adjudication in state court. Based on their guilty pleas, the government successfully sought their removal from the United States. Although at the time of their guilty pleas the Board of Immigration Appeals ("BIA") interpreted the relevant immigration statutes as not requiring removal for this type of deferred adjudication (or at least as allowing for discretionary relief from removal), the petitioners were found to be removable and ineligible for discretionary relief based on precedent that developed after entry of their pleas. They filed for habeas corpus relief, which was denied by the district court. Finding no error, we affirm.

I.

Laura Estela Salazar-Regino and Nohemi Rangel-Rivera are lawful permanent residents who filed habeas petitions in federal district court regarding findings that they were removable and ineligible for discretionary relief from removal; the habeas petitions were consolidated with seven other similar petitions. The district court denied the petitions, and all the petitioners appealed. Salazar-Regino and Rangel-Rivera's cases were selected as the lead cases for briefing and argument. We examine the facts of each of their cases in turn.

A.

Salazar-Regino pleaded guilty on January 7, 1997, in Texas state court of third-degree-felony possession of a controlled substance (intentional and knowing possession of 5 to 50 pounds of marihuana). It was her first offense, and she received deferred adjudication of guilty and was placed on probation for 10 years. On August 10, 1998, the Immigration and Naturalization Service ("INS")[1] commenced removal proceedings against her on the grounds that she was (1) an alien who has been "convicted" of a controlled substance offense pursuant to 8 U.S.C. § 1227(a)(2)(B)(i),[2] and (2) an alien who has been "convicted" of an "aggravated felony" pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii), namely a "drug trafficking crime" as defined by 8 U.S.C. § 1101(a)(43)(B) and 18 U.S.C. § 924(c).

Salazar-Regino denied deportability and moved to terminate the proceedings, contending she was not "convicted" for immigration purposes under the state first-offender exception created in *Matter of Manrique*, 21 I. & N. Dec. 58 (BIA 1995), which held that a first-time state drug offense of simple possession should not be considered

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[1] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice, and its enforcement functions were transferred to the Department of Homeland Security; the entity is now known as the Bureau of Immigration and Customs Enforcement. Because the relevant events began before the reorganization, we continue to refer to the INS.

[2] Title 8 U.S.C. § 1227(a)(2)(B) provides that "any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State [or] the United States relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable."

a conviction for immigration purposes if the alien would have hypothetically been eligible for treatment under the Federal First Offender Act ("FFOA")[3] had he been prosecuted under federal narcotics laws. The immigration judge ("IJ") agreed that Salazar-Regino's deferred adjudication was not a "conviction" and concluded that her crime of drug possession would not be punishable as a felony under federal law, and thereby was not an aggravated felony under *Matter of L-G-*, 20 I. & N. Dec. 905 (BIA 1994).

The INS appealed the termination of the removal proceedings, and the BIA reversed, concluding that Salazar-Regino was deportable on either ground. The BIA found that the deferred adjudication did constitute a "conviction" for immigration purposes under the statutory definition of conviction enacted by Congress in 1996, after *Manrique* but before Salazar-Regino's guilty plea.[4] The BIA pointed to its conclusion in *Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512 (BIA 1999), that the 1996 statutory definition superseded *Manrique*. Furthermore, the BIA concluded that Salazar-Regino was alternatively removable because her state felony drug-possession crime constituted an "aggravated felony" under *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997) (which held that a state felony drug possession crime constitutes an aggravated felony for federal sentencing purposes), and *United States v. Hernandez-Avalos*, 251 F.3d 505, 508-10 (5th Cir. 2001) (which extended the definition to immigration proceedings and explicitly rejected *Matter of L-G-*). Salazar-Regino filed a habeas

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[3] 18 U.S.C. § 3607(a), (b).

[4] *See* 8 U.S.C. § 1101(a)(48) (defining a conviction as, *inter alia* and with no stated exceptions, a "plea of guilty" and some form of "restraint on liberty").

petition in federal district court, challenging the BIA's conclusion. The denial of that petition is the subject of the instant appeal.

B.

Rangel-Rivera pleaded guilty on March 9, 1999, in Texas state court to felony possession of marihuana (between 50 and 2000 pounds) and was granted deferred adjudication. The INS placed her in removal proceedings and charged her with being deportable as an alien convicted of a controlled substances offense. She conceded that she was deportable as charged[5] and applied for discretionary relief pursuant to 8 U.S.C. § 1229b.[6] On May 11, 1999, the IJ found that she deserved relief as a matter of discretion.

The INS appealed, and the BIA reversed, concluding that based on intervening precedent since the time of the prior decision, Rangel-Rivera's crime of felony drug possession was an aggravated felony under *Matter of Yanez-Garcia*, 23 I. & N. Dec. 390 (BIA 2002), which adopted the construction set forth in *Hernandez-Avalos*. Because the BIA found that Rangel-Rivera had committed an aggravated felony, it decided that the IJ had abused his discretion by

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[5] Rangel-Rivera pleaded guilty after *Roldan* was issued, so she is foreclosed from arguing that that the decision was impermissibly applied to her retroactively in defining the term "conviction" for immigration purposes.

[6] Title 8 U.S.C. § 1229b(a)(1) states that cancellation of removal is available at the discretion of the Attorney General if the alien "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony."

granting discretionary relief. Rangel-Rivera filed a habeas petition in federal district court challenging the BIA's conclusion. Its denial is the subject of the instant appeal.

II.

We review questions of law as to jurisdiction and merits *de novo*. *See Requena-Rodriguez v. Pasquarell,* 190 F.3d 299, 302 (5th Cir. 1999). We review the INS's constructions of the law it administers deferentially, under the test established by *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). *See INS v. Aguirre-Aguirre,* 526 U.S. 415, 424, 143 L. Ed. 2d 590, 119 S. Ct. 1439 (1999).

> On reviewing an Agency's construction of a statute it administers, we must perform the well-known two-step inquiry: First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Moosa v. INS, 171 F.3d 994, 1005 (5th Cir. 1999) (citing *Chevron,* 467 U.S. at 842-43).

III.

The INS argues that the district court erred when it held that it (the district court) had jurisdiction over Salazar-Regino's petition. The essence of the INS's argument is that we, as the court of appeals, had jurisdiction to review her appeal from the BIA's decision *directly,* and her habeas petition should therefore have been dismissed because she failed to exhaust her other available remedies before filing that petition.[7]

A.

In resolving this jurisdictional question, the first issue to address is whether we would have had jurisdiction to review Salazar-Regino's claims on direct appeal. As a threshold matter, 8 U.S.C. § 1252(a) – the statute governing review of final orders of removal – states that review of such orders shall take place in the courts of appeals by means of petitions for direct review. Section 1252(a)(2)(C), however, eliminates jurisdiction to review final orders of removal involving aliens who are deportable for conviction of certain crimes, including controlled substances offenses and aggravated felonies.[8]

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[7] The INS does not aver that the district court lacked habeas jurisdiction over Rangel-Rivera's petition, because she conceded that she was removable and only challenges her ineligibility for discretionary cancellation of removal.

[8] Section 1252(a)(2)(C) reads as follows:

"Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of

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Despite this jurisdictional bar, it is well established that we retain jurisdiction to determine our own jurisdiction.[9] Specifically,

> [w]hen confronted with a petition for review from a criminal alien, a court of appeals must make three specific inquiries before dismissing the petition as barred § 1252(a)(2)(C): (1) whether specific conditions act to bar jurisdiction over the petition to review; (2) whether the conditions that bar jurisdiction – for example as in this case, deportation for an aggravated felony – have been 'constitutionally applied;' and (3) if the jurisdictional bar applies, whether the remaining quantum of review satisfies the Constitution.

Garcia, 234 F.3d at 259. The issues raised by Salazar-Regino appear to fall squarely into what we have previously considered to be part of the "jurisdictional inquiry;" she challenges whether she was "convicted" for the purposes of removal, and she brings constitutional challenges (retroactivity, due process, and equal protection) to whether the conditions that bar jurisdiction (whether her

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> removal against an alien who is removable by reason of having committed a criminal offense covered in section 1181(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title."

8 U.S.C. § 1252(a)(2)(C).

[9] *See Lee v. Gonzales,* 410 F.3d 778, 2005 U.S. App. LEXIS 9946, at *9-*10 (5th Cir. May 31, 2005); *see also Flores-Garza v. INS,* 328 F.3d 797, 802 (5th Cir. 2003); *Garcia v. Reno,* 234 F.3d 257, 259 (5th Cir. 2000).

deferred adjudication was a "conviction" and whether her offense was an "aggravated felony") apply.[10]

Finally, Salazar-Regino notes that a couple of her claims could not have been reviewed by us directly – namely, her challenge to her ineligibility for discretionary relief and her international law argument. She is correct, for these questions do not address the jurisdictional inquiry as we framed it in *Garcia, id.*

The issues that we do have jurisdiction to consider on direct review, however, are threshold issues that must be considered before reaching Salazar-Regino's ineligibility for discretionary relief. As we explained in *Lee*, 2005 U.S. App. LEXIS 9946, at *19, the proper procedure in such a situation is first to file a petition for direct review. If we then determine that the jurisdiction-stripping statute, § 1252(a)(2)(C), does not apply (because, for example, we decide that the offense was not an aggravated felony), then the alien is not removable, and our inquiry ends. *See id.* If, on the other hand, we determine that the alien is removable and the jurisdiction-stripping statute applies, we dismiss the case, and the alien, lacking another avenue of review, can proceed in habeas. *See id.* In sum, we agree

[10] Salazar-Regino claims this court does not have jurisdiction to entertain constitutional challenges where § 1252(a)(2)(C) applies, but the cases she cites for this proposition – *Calcano-Martinez v. INS*, 533 U.S. 348, 150 L. Ed. 2d 392, 121 S. Ct. 2268 (2001), and *Flores-Garza*, 328 F.3d at 802-03 – are inapposite. The Court in *Calcano-Martinez* declined to consider this issue, because it was not relevant to the disposition of the petitions under review. *See Calcano-Martinez*, 533 U.S. at 350 n.2. Similarly, *Flores-Garza* did not decide the issue, because there we found that it was undisputed that the alien was removable by another reason that independently triggered the jurisdiction-stripping provision. *See Flores-Garza*, 328 F.3d at 802.

with the government's contention that we had jurisdiction to entertain the threshold issues in Salazar-Regino's appeal on direct review.

B.

Because there was jurisdiction for us to hear Salazar-Regino's appeal on direct review, the government urges us to dismiss her habeas petition for failure to exhaust available judicial remedies.[11] The district court correctly noted that at the time when Salazar-Regino filed her habeas petition in the district court, there was debate among the circuits as to whether the requirement of exhaustion of available judicial remedies still applies in the wake of *INS v. St. Cyr*, 533 U.S. 289, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001).[12] Several courts have held that the availability of an alternative forum of review does not conclusively determine, in the absence of plain Congressional intent, that habeas jurisdiction is no longer available.[13]

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[11] *See Santos v. Reno*, 228 F.3d 591, 597 (5th Cir. 2000) (holding that habeas is unavailable where the court of appeals could have heard the claims presented through another avenue of relief); *Rivera-Sanchez v. Reno*, 198 F.3d 545, 547 (5th Cir. 1999) (stating that "habeas jurisdiction exists only where 'challenges [to deportation orders] cannot be considered on direct review by the court of appeals' "); *Requena-Rodriguez v. Pasquarell*, 190 F.3d 299, 305 (5th Cir. 1999) (stating that habeas jurisdiction exists to review "statutory and constitutional challenges if those challenges cannot be considered on direct review").

[12] *Seale v. INS*, 323 F.3d 150, 154 (1st Cir. 2003) (concluding that *St. Cyr* has some ambiguous language such that "the question remains open whether the existence of another available judicial forum to adjudicate the merits of an alien's claim overrides the absence of a clear statement by Congress that it intended to strip the district courts of their habeas jurisdiction.")

[13] *See Liu v. INS*, 293 F.3d 36, 40 (2d Cir. 2002) (stating that the forum-availability argument merely reinforced but did not determine

(Continued on following page)

Other circuits have ruled the other way, holding that there is no habeas jurisdiction to review an alien's removal order where he failed to exhaust available judicial remedies.[14]

Although we had not ruled on this precise jurisdictional issue at the time the district court considered Salazar-Regino's habeas petition, we have since adopted the position that the exhaustion requirement still applies post-*St. Cyr*. *See Lee v. Gonzales*, 410 F.3d 778, 2005 U.S. App. LEXIS 9946 (5th Cir. May 31, 2005). Because we have determined that we could have reviewed Salazar-Regino's claims on direct review, and she failed to pursue that avenue of relief before filing her habeas petition in the district court, dismissal of her habeas petition is appropriate.

Despite this, not all is lost for Salazar-Regino, for we decline to dismiss for lack of jurisdiction in this case and may consider the merits of the issues raised by her habeas petition, because transfer to this court is appropriate in the interest of justice under 28 U.S.C. § 1631,[15] which provides:

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the conclusion that Congress had not plainly repealed habeas review); *see also Chmakov v. Blackman*, 266 F.3d 210, 215 (3d Cir. 2001) (concluding that although the legal questions could have been considered on direct review, the aliens still could bring a habeas petition).

[14] *Lopez v. Heinauer*, 332 F.3d 507, 510-11 (8th Cir. 2003) ("Although habeas jurisdiction remains available to deportees who raise questions of law and who have no other available judicial forum [citing *St. Cyr*], the statute here provides an adequate judicial forum, permitting the noncriminal deportee to file a petition for review in the appropriate court of appeals. . . . Lopez filed the wrong action in the wrong federal court."); *see also Baeta v. Sonchik*, 273 F.3d 1261, 1264 (9th Cir. 2001).

[15] The INS acknowledges that transfer is appropriate under § 1631.

> Whether a civil action is filed in a court as defined in section of 610 of this title or an appeal, including a petition for review of administrative action, is noticed for or filed with such court and the court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

28 U.S.C. § 1631. In the immigration context, that statute authorizes us to transfer these cases to this court if "(1) we would have been able to exercise jurisdiction on the date that they were filed in the district court; (2) the district court lacked jurisdiction over the cases; and (3) the transfer is in the interests of justice." *Castro-Cortez v. INS*, 239 F.3d 1037, 1046 (9th Cir. 2001).[16]

The first requirement is met here, because we would have had jurisdiction to review the BIA's disposition of Salazar-Regino's claims on direct review, and she filed her habeas petition in the district court within the thirty-day

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[16] Technically, the text of § 1631 authorizes only the court in which the action was filed (which would be the district court) to effect a transfer. This places us in an odd procedural posture, because it means that if we find that the district court erred in not transferring the case to us, we would have to remand with direction to transfer back to us so that we could consider what is already before us. *See Lopez*, 332 F.3d at 511. We agree with the Eighth and Ninth Circuits that we should dispense with that formality in the interest of judicial economy, and consider the case properly transferred to us where it is otherwise appropriate under § 1631. *See id.; see also In re McCauley*, 814 F.2d 1350, 1352 (9th Cir. 1987).

deadline for filing for direct review.[17] Next, we have decided that the district court lacked habeas jurisdiction because Salazar-Regino failed to exhaust her available judicial remedies. Finally, it would be in the interest of justice to allow this relief, given that the caselaw regarding this procedure was admittedly murky post-*St. Cyr,* and the purpose of the transfer statute "is to aid litigants who were confused about the proper forum for review." *Baeta,* 273 F.3d at 1264-65 (internal citations omitted).

As a final complication, we must deal with the claims that Salazar-Regino could not have brought on direct review, namely, her challenge to her ineligibility for discretionary relief and her international law claim. The district court pointed to the existence of these claims to justify retaining jurisdiction over all of Salazar-Regino's claims.

The Ninth Circuit has taken a different approach – it splits the claims into those that could have been brought on direct appeal and those that could not, and treats them differently.[18] This approach is preferable, because it comports with the procedure recommended in *Lee,* 2005 U.S. App. LEXIS 9946, at *19 – that an alien first present his threshold jurisdictional issues on direct appeal, and then if unsuccessful pursue the remainder of his claims in habeas – and because it also prevents a litigant from manufacturing

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[17] *See* 8 U.S.C. § 1252(b)(1) (stating that a petition for direct review must be filed no later than 30 days after the date of the final order of removal).

[18] *Cf. Baeta,* 273 F.3d at 1264 ("Under the circumstances presented, transfer of the *portion* of the habeas petition [that could have been raised on direct review] to this Court is appropriate." (emphasis added)).

habeas jurisdiction by bootstrapping, onto his habeas petition, frivolous issues that could not be reviewed on direct appeal.

Thus, pursuant to § 1631, we transfer all of Salazar-Regino's claims (other than her challenge to her ineligibility for discretionary relief and her international law claim) to this court for consideration on the merits. Because habeas jurisdiction was proper for the remaining claims, we do not transfer those, and we consider them on the merits as properly appealed to us after being denied by the district court.

IV.

Salazar-Regino challenges the BIA's decision that her Texas deferred adjudication constitutes a "conviction" for removal purposes. Importantly, no definition of "conviction" existed before 1996. In this context, the BIA decided *Matter of Manrique*, 21 I. & N. Dec. 58 (BIA 1995), which held that aliens who received deferred adjudication for first-time drug offenses in state court who would be eligible for discretionary deferred adjudication under the FFOA[19] – had they been prosecuted under federal drug laws – would not be considered to have a "conviction" for immigration removal purposes. *See id.* at 64. That decision was based on a policy consideration that the appropriate focus should be on the alien's conduct, not the breadth of the state rehabilitative statute; the BIA decided that

[19] Under the FFOA, a successfully completed deferred adjudication could not be considered "a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." 18 U.S.C. § 3607(b).

leniency should be extended to aliens to provide them the same treatment they would have received under federal law if they had been subject to federal rather than state prosecution. *See id.* at 63-64.

In 1996, Congress drafted a concrete definition of "conviction" for immigration purposes:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. § 1101(a)(48). In *Matter of Roldan-Santoyo*, 22 I. & N. Dec. 512, 518 (BIA 1999), the BIA determined that this new definition abrogated *Manrique,* noting that *Manrique* and the decisions it relied on were decided "in the absence of any indication from Congress as to whether a state rehabilitative action should be given any effect in immigration proceedings." *Roldan-Santoyo*, 22 I. & N. Dec. at 526. The BIA observed that the plain language of § 1101(a)(48) dictated that

> a state action that purports to abrogate what would otherwise be considered a conviction, as the result of a state rehabilitative statute, rather than as a result of a procedure that vacates a conviction on the merits or on grounds relating to

> a statutory or constitutional violation, has no effect in determining whether an alien has been convicted for immigration purposes.

Id. at 527. The BIA assumed that Congress was aware of its administrative exception for deportability that was created in *Manrique* but noted that Congress had failed to provide any exceptions that would allow the *Manrique* exception to survive. *See id.*

Mainly by citing and crediting the arguments made in the *Roldan* dissents, Salazar-Regino argues that *Roldan* incorrectly concluded that § 1101(a)(48) overruled *Manrique*. As the district court correctly found, however, that question is foreclosed by *Moosa v. INS*, 171 F.3d 994, 1005-06 (5th Cir. 1999), which held that "considering only the text of § 322(a), a Texas deferred adjudication, *see supra* note 1, is a 'conviction.'".[20] Exercising *Chevron* deference, we cannot say that the BIA's interpretation of the statute it is charged with administering was an impermissible construction in light of our binding precedent in *Moosa*, in which we found this construction to be dictated by the text of the statute. *See id.* at 1005.

V.

Salazar-Regino and Rangel-Rivera claim that the BIA erroneously applied our construction of "aggravated

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[20] In *Moosa*, we found that the first prong of § 1101(a)(48) was met because Texas law states that a judge may enter a deferred adjudication "after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt." *Moosa*, 171 F.3d at 1005 (citing Tex.Code. Crim. P. art. 42.12 § 5(a)). Further, the court found the second prong was met because probation constitutes a punishment and a restraint on liberty. *See id.* at 1006.

felony" expressed in *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001). Congress has defined "aggravated felony" for immigration purposes to mean, *inter alia*, "a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B). Section 924(c) of Title 18, in turn, defines "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. § 810 *et seq.*) . . . " 18 U.S.C. § 924(c)(2); *Hernandez-Avalos*, 251 F.3d at 507.

As of 1995, the BIA used a "hypothetical federal felony" approach in defining aggravated felonies, which included any state offense that would be "punishable as a felony" under the Controlled Substances Act if it were a federal offense. *See id.* at 508-09; *Matter of L-G-*, 21 I. & N. Dec. 89 (BIA 1995). Based on this reading, the BIA construed state felony drug possession as not coming within the definition of aggravated felony for immigration purposes. *See Hernandez-Avalos*, 251 F.3d at 508-10. Meanwhile, we used a different interpretation in federal sentencing cases, construing the definition of aggravated felony to include offenses that are (1) punishable under the Controlled Substances Act (whether as a felony or not) and (2) a felony in the law of the convicting jurisdiction. This led to divergent results. *See id.* at 508 (citing *United States v. Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997)).

In *Hernandez-Avalos, id.*, we resolved this discrepancy by extending to the immigration context the definition of "aggravated felony" as established by *Hinojosa-Lopez*. We decided that the plain language of the statutes "indicate[s] that Congress made a deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only as a misdemeanor under the

[Controlled Substances Act], and that a lack of a uniform substantive test for determining which drug offenses qualify as 'aggravated felonies' is the consequence of a deliberate policy choice by Congress that the BIA and the courts cannot disregard" (internal citations omitted).

The BIA directly applied *Hernandez-Avalos* in Salazar-Regino's case, and to the extent that her argument attacks that case as wrongly decided, it is foreclosed by our obligation to follow the prior panel opinion. Similarly, we cannot say that the BIA was incorrect to apply *Matter of Yanez-Garcia,* 23 I. & N. Dec. 390 (BIA 2002) (adopting the *Hernandez-Avalos* rule) to Rangel-Rivera, because we are bound by *Hernandez-Avalos,* which tells us that the plain language of the statute dictates the interpretation of "aggravated felony" made by the BIA in *Yanez-Garcia.* Accordingly, we cannot say that the BIA, in light of *Chevron* deference, made an unreasonable interpretation of the statute that it is charged to administer.

VI.

Salazar-Regino and Rangel-Rivera claim that their due process rights were violated by the retroactive application of *Roldan* and *Hernandez-Avalos* to them, because they pleaded guilty before those rulings were made. As correctly noted by the district court, the retroactive application of judicial decisions is a longstanding maxim. "The general principle that statutes operate prospectively and judicial decisions apply retroactively had been followed by the common law and the Supreme Court's decisions 'for near a thousand years.'" *Hulin v. Fibreboard Corp.,* 178 F.3d 316, 329 (5th Cir. 1999) (quoting *Kuhn v. Fairmont*

Coal Co., 215 U.S. 349, 372, 54 L. Ed. 228, 30 S. Ct. 140 (1910) (Holmes, J., dissenting)).

This reasoning originates from the notion that "[w]hen [the courts] apply a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the court's] announcement of the rule." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97, 125 L. Ed. 2d 74, 113 S. Ct. 2510 (1993). The logic is that judges "say what the law is," rather than "what the law shall be" as legislatures do; overruling a former judicial decision is not a new declaration of law, but rather a new decision that corrects legal error. *See id.* at 107 (Scalia, J., concurring) (citing *Marbury v. Madison*, 5 U.S. 137, 2 L. Ed. 60 (1803)).[21]

A.

First, Salazar-Regino argues that principles of *administrative* rather than judicial retroactivity should be applied, citing *Microcomputer Tech. Inst. v. Riley*, 139 F.3d 1044, 1050 (5th Cir. 1998).[22] As we stated in *Riley*,

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[21] For a comprehensive discussion of the development of the retroactivity doctrine in the Supreme Court, *see Hulin*, 178 F.3d at 329-33.

[22] This argument could only possibly apply to the retroactive application of *Roldan*, which was a BIA decision, and not the retroactive application of *Hernandez-Avalos*, which is one of this court's opinions. Consequently, this argument could benefit only Salazar-Regino and not Rangel-Rivera, who appeals only the retroactive application of *Hernandez-Avalos* to prevent her obtaining discretionary relief from removal.

> When an agency changes its policy prospectively, a reviewing court need only determine the reasonableness of the new interpretation in terms of *Chevron*. But where an agency makes a change with retroactive effect, the reviewing court must also determine whether application of the new policy to a party who relied on the old is so unfair as to be arbitrary and capricious.

Id. We concluded that in evaluating the retroactive effect of a change in administrative policy, we "balance the ills of retroactivity against the disadvantages of prospectivity." *Id.*

We do not apply the administrative retroactivity test in this case, where the rule that is sought to be applied retroactively is not a change in administrative policy, but rather an administrative decision that interprets a statutory change. In *Riley,* the petitioner claimed reliance on policy stated in a memorandum, issued by the agency, that was contrary to the administrative decision made by the agency in his case. *See id.* at 1049-50.

Salazar-Regino may claim reliance on policy expressed in *Manrique* before her guilty plea, but the fact is that § 1101(a)(48), defining "conviction," also predated her plea, and thus *Roldan* did not constitute a *sua sponte* change in policy that we review for arbitrariness and capriciousness, but rather a determination that the statute that it was charged with administering abrogated its prior policy. *Roldan* was not establishing a new rule or standard of conduct, but was merely determining the effect of a superseding act of Congress.

B.

The petitioners also claim, citing *Hulin,* 178 F.3d at 333, that the judicial retroactivity doctrine is inapplicable to apply *Roldan* and *Hernandez-Avalos* to their cases because they claim that judicial retroactivity cannot trump the claimed due process violation, the requirement of "fair notice" under *BMW of North America v. Gore,* 517 U.S. 559, 134 L. Ed. 2d 809, 116 S. Ct. 1589 (1996). In *Hulin,* we noted several instances in which a new rule does not "determine the outcome of the case":

> Thus, a court may find (1) an alternative way of curing the constitutional violation, or (2) a previously existing, independent legal basis (having nothing to do with retroactivity) for denying relief, or (3) as in the law of qualified immunity, a well-established general legal rule that trumps the new rule of law, which general rule reflects both reliance interests and other significant policy justifications, or (4) a principle of law, such as that of "finality" present in the *Teague* context, that limits the principle of retroactivity itself. But, this case [where a concern about reliance alone has led the Ohio court to create what amounts to an ad hoc exemption from retroactivity involves no such instance[.]]

Hulin, 178 F.3d at 333 (citing *Reynoldsville Casket Co. v. Hyde,* 514 U.S. 749, 758-59, 131 L. Ed. 2d 820, 115 S. Ct. 1745 (1995)). We then added:

> Evidently, the Supreme Court has concluded that the *Linkletter*[23] and *Chevron Oil*[24] departures from traditional retroactivity doctrine proved unsatisfactory. The Court's most recent decisions substantially reject those departures and return to the general rule of adjudicative retroactivity leaving only an *indistinct possibility* of the application of pure prospectivity *in an extremely unusual and unforeseeable case.*

Id. (emphasis added). The petitioners then cite language from *St. Cyr,* 533 U.S. at 323-24, which stated that it would be "contrary to 'familiar considerations of fair notice, reasonable reliance and settled expectations'" to disrupt a fully-executed plea bargain by making drastic, retroactive, changes to its immigration consequences – and claim that it establishes the "extremely unusual" circumstances envisioned by *Hulin* that may allow for the "indistinct possibility" that judicial rulings not be given retroactive effect.

The flaw in petitioners' presentation is that it is in essence nothing more than an argument that the rulings should not be applied retroactively because of reliance interests – that petitioners detrimentally relied on the BIA's pronouncements pre-*Manrique* and pre-*Hernandez-Avalos.* The Supreme Court has repeatedly rejected

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[23] 381 U.S. 618, 14 L. Ed. 2d 601, 85 S. Ct. 1731 (1965) (holding that a decision to limit a new rule of criminal constitutional law to prospective application can be based on a balancing of the purpose of the new rule, the reliance placed on the previous view of the law, and the effect on the administration of justice of a retrospective application).

[24] 404 U.S. 97, 30 L. Ed. 2d 296, 92 S. Ct. 349 (1971) (holding that in the federal noncriminal law context, a judicial decision can be applied nonretroactively if it established a new principle of law, if such a limitation will avoid substantial inequitable results, and if retrospective application will not retard the purpose and effect of the new rule).

reliance alone as a reason for overcoming the retroactivity doctrine.[25] In this context, where reliance interests alone are insufficient to overcome judicial retroactivity, petitioners fail to cite any cases that dictate "a well-established general legal rule that trumps the new rule of law, which general rule reflects *both* reliance interests *and other significant policy justifications*" as in the law of qualified immunity. *Hulin,* 178 F.3d at 333 (emphasis added).

Although it is true that in *St. Cyr,* 533 U.S. at 321-22, the Court noted the problems of fair notice in the context of attaching new disabilities to plea agreements, that case dealt with the question whether a *statutory* change could be applied retroactively by command of Congress, and did not deal with whether a judicial decision can be applied in such a way. *See St. Cyr,* 533 U.S. at 321-22. This distinction is important – although the plain, *correct* statement of the law provided St. Cyr with the type of relief he desired at the time of his plea agreement, Salazar-Regino and Rangel-Rivera were relying on plainly *erroneous* interpretations of the law in expecting relief at the time they pleaded guilty, as illuminated by the BIA in *Roldan* and by this court in *Hernandez-Avalos.*[26] The district court and

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[25] *See, e.g., Harper,* 509 U.S. at 97 ("In both civil and criminal cases, we can scarcely permit the substantive law [to] shift and spring according to the particular equities of individual parties' claims of actual reliance on an old rule and of harm from a retroactive application of the new rule.") (internal citations omitted); *see also Reynoldsville Casket,* 514 U.S. at 759.

[26] In *Hernandez-Avalos,* the alien argued that the interpretation of "aggravated felony" we articulated in that case should not apply to him because, had the INS officials properly applied BIA precedent at the time he was removed, his underlying state crime would not have qualified. *See Hernandez-Avalos,* 251 F.3d at 508. We rejected this claim, noting that "we see no reason why the procedural posture of this

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the BIA did not err in applying *Roldan* and *Hernandez-Avalos* retroactively.

VII.

The petitioners argue that their removal violated the Equal Protection Clause for two reasons, based on alleged unequal disposition of their cases resulting from the (1) timing and (2) location of their proceedings. We examine each in turn.

A.

Salazar-Regino claims her rights under the Equal Protection Clause were violated because the results of her proceedings were influenced by their timing. She finds unfairness in the fact that had her removal proceedings taken place a few weeks later, *Roldan* would already have been issued, so the IJ would have found her removable. Because, however, at that hypothetical time, *Hernandez-Avalos* would not yet have been issued, Salazar-Regino would have been eligible for discretionary relief. Although Salazar-Regino is correct concerning the unfortunate effect of the timing of her proceedings, we dismiss the argument as frivolous, because she points to no persuasive authority that an Equal Protection Clause violation may be based on timing.[27]

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case requires us to hold that it was fundamentally unfair to treat Hernandez as an aggravated felon because he should have the benefit of an agency's erroneous interpretation of applicable law." *Id.* at 509.

[27] Salazar-Regino cites only the *separate* opinion in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 71 L. Ed. 2d 265, 102 S. Ct. 1148 (1982), which would have found an Equal Protection violation where a

(Continued on following page)

B.

Petitioners allege equal protection violations based on the *location* of their proceedings; arguing that varying case law in other circuits would have made them eligible for relief. We dismiss this claim as frivolous – adopting this unsupported argument would wreck havoc on the federal judicial system as we know it – basically disallowing any split of authority between or among the various circuits.

VIII.

Petitioners contend their removal violated international law. Their entire argument solely consists of a citation to *Beharry v. Reno,* 183 F.Supp.2d 584, 593-99 (E.D.N.Y. 2002). This point is waived for failure to brief

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statute gave different treatment to discrimination claims that were considered by a Commission within 120 days of being filed by a complainant, and claims that were considered afterwards (which would be summarily dismissed). The Court found no rational basis in the distinction, because "terminating potentially meritorious claims in a random manner obviously cannot serve to redress instances of discrimination," prevention of which is the purpose of the statute. *See id.* at 439 (separate opinion of Blackmun, J.).

This is distinguishable from the situation at hand, because no statute works here to create divergent outcomes based on timing of certain actions beyond Salazar-Regino's control; rather, the disparate effects are a result of the speed of the removal proceedings in relation to the issuance of other legal precedent. The fact is that any party who is subject to the effect of a judicial decision that changes the interpretation of a statute can always complain that he received disparate treatment *vis-á-vis* others whose cases were finalized before the new interpretation was rendered. We cannot find an equal protection violation in such a circumstance, because it would eviscerate the well-established judicial retroactivity doctrine.

adequately.[28] Beyond failing to explain how the cited opinion should apply to the instant case, petitioners fail to mention that the opinion is not even good law: It was overruled in *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003).

IX.

In summary, we DISMISS Salazar-Regino's claims that we transferred to this court, pursuant to 28 U.S.C. § 1631, because the BIA did not commit reversible error. We AFFIRM the dismissal of the entirety of Rangel-Rivera's habeas petition and the claims that remained in Salazar-Regino's habeas petition, because the district court committed no reversible error.

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[28] *See* FED. R. APP. P. 28(a)(9)(A); *see also United States v. Ogle*, 415 F.3d 382, 2005 U.S. App. LEXIS 12714, at *2 (5th Cir. June 27, 2005) (per curiam); *United States v. Martinez*, 263 F.3d 436 (5th Cir. 2001).

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

LAURA ESTELLA SALAZAR-REGINO,	§	
	§	
v.	§	**CIVIL ACTION**
	§	**NO. B-02-45**
E.M. TROMINSKI, INS DISTRICT DIRECTOR, ET AL.	§	
	§	
TEODULO CANTU-DELGADILLO,	§	
	§	
v.	§	**CIVIL ACTION**
	§	**NO. B-02-114**
E.M. TROMINSKI, INS DISTRICT DIRECTOR, ET AL.	§	
	§	
DANIEL CARRIZALOS-PEREZ,	§	
	§	
v.	§	**CIVIL ACTION**
	§	**NO. B-02-136**
AARON CABRERA, INS ACTING DISTRICT DIRECTOR, ET AL.	§	
	§	
MANUEL SANDOVAL-HERRERA,	§	
	§	
v.	§	**CIVIL ACTION**
	§	**NO. B-02-138**
AARON CABRERA, INS ACTING DISTRICT DIRECTOR, ET AL.	§	
	§	
RAUL HERNANDEZ-PANTOJA,	§	
	§	
v.	§	**CIVIL ACTION**
	§	**NO. B-02-197**
JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.	§	
	§	
	§	

JOSE MARTIN OVIEDO-SIFUENTES,	§	
v.	§	**CIVIL ACTION NO. B-02-198**
JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.	§	
CESAR LUCIO,	§	
v.	§	**CIVIL ACTION NO. B-02-225**
JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.	§	
PRAXEDIS RODRIGUEZ-CASTRO,	§	
v.	§	**CIVIL ACTION NO. B-02-228**
JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.	§	
NOHEMI RANGEL-RIVERA,	§	
v.	§	**CIVIL ACTION NO. B-03-002**
JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.	§	

ORDER

(Entered Oct. 02, 2003)

BE IT REMEMBERED that on September 30, 2003, the Court considered Respondents'[1] timely objections to the Magistrate Judge's Report and Recommendation ("R&R"). Because no parties have objected to the consolidation of the above listed cases, and because the habeas petitions involve common questions of law and fact, the Court consolidates Petitioners' cases and reviews the claims in one decision. *See* Fed. R. Civ. P. 42. For the reasons that follow, the Court **DECLINES TO ADOPT** the final determination of the Report and Recommendation and **DENIES** Petitioners' habeas petitions.

I. Standard of Review of Magistrate Judge's Report and Recommendation

Petitioners bring this action pursuant to 28 U.S.C. § 2241 seeking a writ a habeas corpus. After referral to a United States Magistrate Judge, this Court reviews *de novo* those portions of the R&R to which objection is made. "A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate." 28 U.S.C. § 636(b)(1)(C). Those portions of the R&R for which there are no objections the Court reviews

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[1] At the time this habeas petition was filed, the Immigration and Naturalization Service ("INS") was an agency organized within the United States Department of Justice. The former INS has now been reorganized into the Bureau of Immigration and Customs Enforcement ("ICE") within the new United States Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, § 471, 116 Stat. 2135, 2205 (2002). For ease of reference, this decision will refer to the agency as the INS.

for clearly erroneous findings and conclusions of law. *See United States v. Wilson,* 864 F.2d 1219, 1221 (5th Cir. 1989).

II. Factual and Procedural Background

The Magistrate Judge presented a consolidated R&R due to the similar nature of the Petitioners' claims and factual and procedural backgrounds. Respondents lodged a number of objections to the Magistrate Judge's R&R. Neither Petitioners nor the INS objected to the Magistrate Judge's consolidation of these cases. Those objections concerning the Magistrate Judge's factual findings focus on his election to conduct an evidentiary hearing and consider additional testimony regarding the Petitioners' understanding of the law and immigration consequences at the time they entered into plea agreements at the state court level. The objections, therefore, do not focus on the general factual backgrounds of each Petitioner. This Court adopts by reference *only* the Magistrate Judge's recitation of each Petitioners' criminal and immigration history, as is supported by the administrative record.

At the time of entering their guilty pleas, all Petitioners were lawful permanent residents ("LPRs"). Petitioners seek habeas corpus relief after receiving final orders of removal from the Board of Immigration Appeals ("BIA"). Petitioners raise constitutional and statutory challenges to the BIA's conclusions that they are removable because they were convicted of an aggravated felony under the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. § 1227(a)(2)(B)(i).

All Petitioners pled guilty in state courts to offenses involving simple possession of a controlled substance.

Several petitioners received deferred adjudication,[2] and others received punishment consisting of probation. At the time Petitioners entered their plea agreements, their offenses under state rehabilitative statutes were not, as a matter of BIA policy, considered convictions if the aliens met certain requirements. Additionally, their offenses of simple possession of a controlled substance were not considered to be aggravated felonies under the INA. Nevertheless, as a result of changes in the law after Petitioners pled guilty, to be discussed in this opinion, the INS later initiated removal proceedings on the basis of these convictions. Because the Petitioners' offenses of simple possession are classified as aggravated felonies, Petitioners are each ineligible to apply for cancellation of removal under the relief established in 8 U.S.C. § 1229b(a)(3) (providing aliens convicted of aggravated felonies are ineligible for cancellation of removal). Absent a conviction for an aggravated felony, the Petitioners would have been eligible to apply for cancellation of removal under section 1229b because Petitioners pled guilty prior to the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").

Because the Court finds the Magistrate Judge's R&R is not supported by the law, the Court **DECLINES TO ADOPT** the R&R. For the reasons that follow, the Court **DENIES** Petitioners all requested relief.

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[2] Some Petitioners received deferred adjudication pursuant to the Texas Code of Criminal Procedure, art. 42.12, § 5 (authorizing a judge to "defer further proceedings without entering an adjudication of guilt" after a defendant's plea of guilty or *nolo contendere*, "and place the defendant on community supervision.").

III. Legal Framework[3]

Before Congress passed IIRIRA, the BIA struggled to define "conviction" for immigration purposes because most states, like Texas, have rehabilitative statutes that allow for deferred adjudication or forms of expungement. *See, e.g., Matter of Roldan-Santoyo,* Int. Dec. 3377 (BIA 1999), *order vacated sub nom. Lujan-Armendariz v. INS,* 222 F.3d 728 (9th Cir. 2000). The Federal First Offender Act ("FFOA") is an example of a rehabilitative statute at the federal level. *See* 18 U.S.C. § 3607(a). This statute allows first time offenders found guilty under federal law for simple possession of a controlled substance to be placed on probation for a term not to exceed one year. *See id.* Upon successful completion of the probationary period, the sentencing court then dismisses the proceedings and discharges the offender from probation. *See id.* Most relevant for the cases now before this Court, the statute provides that a conviction under the FFOA "shall not be considered a conviction for the purpose of a disqualification or disability imposed by law upon the conviction of a crime, or for any other purpose." *Id.* § 3607(b).

Long before the enactment of the FFOA, the BIA instituted a policy whereby it disregarded the expungement of drug convictions under state law, and therefore did not permit an expunged state drug conviction to be eliminated for immigration purposes. *See Matter of A-F,* 8

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[3] The Court sets out only a brief description of case law history concerning the concept of criminal convictions and their treatment under state and federal rehabilitative statutes. For more detailed accounts, *see Matter of Roldan,* Int. Dec. 3377 (BIA 1999); *In re Salazar-Regino,* 23 I. & N. Dec. 223 (BIA 2002); *In re Yanez-Garcia,* 23 I. & N. 390 (BIA 2002).

I.&N. Dec. 429, 445-46 (BIA, A.G. 1956). *See also Lujan-Armendariz,* 222 F.3d at 734-43 (recounting the legal developments concerning the BIA's policy and convictions under immigration law). Courts of appeals followed suit and agreed that aliens could not escape deportation by technical erasure of the conviction, *See, e.g., Gonzalez de Lara v. United States,* 439 F.2d 1316 (5th Cir. 1971).

With the enactment of the FFOA, the BIA altered this policy and held that drug offenses expunged under the FFOA, or under a state law "counterpart" to the FFOA would not be considered a conviction for immigration purposes and would therefore not serve as the predicate for deportation. *See Matter of Werk,* 16 I. & N. Dec. 234 (BIA 1977). The BIA defined a state law "counterpart" as a state rehabilitative statute no "broader in scope than the FFOA." *In re Manrique,* 21 I.&N. Dec. 58 (BIA 1995). Later, *In re Manrique* established new "first offender treatment under the immigration laws." The BIA determined, "the policy of leniency in immigration proceedings shown to aliens subject to treatment under [the FFOA] will be extended to aliens prosecuted under state law who establish [certain] criteria." *Manrique,* 21 I.&N. Dec. at 64. To qualify for this leniency, the alien had to: 1) be a first offender of controlled substance laws, 2) have pled or been found guilty of the offense of simple possession of a controlled substance, and 3) not have previously been accorded first offender treatment under any law. Additionally, "[t]he court [must] enter[ ] an order pursuant to a state rehabilitative statute under which the alien's criminal proceedings have been deferred pending successful completion of probation or the proceedings have been or will be dismissed after probation." *Manrique,* 21 I.&N. at 64. Under the policy announced in *Manrique,* "an alien

who has been accorded rehabilitative treatment under a state statute [would] not be deported if he establish[ed] that he would have been eligible for federal first offender treatment under the provisions of the [FFOA] had he been prosecuted under federal law." *Id.* at 58. Through its decision in *Manrique,* the BIA attempted to equalize treatment of those aliens who had committed the same crime as first-time offenders, but who were treated differently for immigration purposes. At the time, different treatment depended upon whether offenses were expunged under the FFOA or a state law counterpart (for which they would not be deported) or expunged under another state law (for which they could deported).

After the BIA's new requirements were announced in *Manrique* and put into place, Congress enacted IIRIRA in 1996. For the first time, Congress provided a definition of "conviction" in section 1101(a)(48)(A). That definition is in effect today and states:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has ben [sic] withheld, where –
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted to sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. § 1101(a)(48)(A).

The enactment of this new definition in IIRIRA sparked a debate as to whether various forms of expungements, dismissals, vacateurs, discharges, or other forms of removing a guilty plea or record of guilt would be given effect in the immigration context, and thus relieve the alien from deportation resulting from his conviction. The BIA took the position in *Matter of Roldan-Santoyo,* 22 I.&N. Dec. 512 (BIA 1999) that the statutory definition of "conviction" in section 1101(a)(48)(A) superseded the BIA's earlier holding in *Matter of Manrique.* Accordingly, *Roldan* held that "an alien is considered convicted for immigration purposes upon the initial satisfaction of the requirements of section 1101(a)(48)(A) of the Act, and that he remains convicted notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative statute." 22 I.&N. 512. *See also Moosa v. INS,* 171 F.3d 994, 997, 1005-06 (5th Cir. 1999) (holding that alien who completed a term of supervision pursuant to the Texas deferred adjudication statute remained "convicted" for immigration purposes under 1101(a)(48)(A)). In *Roldan,* therefore, the BIA's rationale was that Congress "intends that the determination of whether an alien is convicted for immigration purposes be fixed at the time of the original determination of guilt, coupled with the imposition of some punishment." 22 I. & N. Dec. 512.

Circuit courts have weighed in on the effect of section 1101(a)(48)(A) on the BIA's earlier policies. Most notably, the Ninth Circuit disagreed with the BIA's interpretation in *Roldan,* and in an appeal of that case ruled that arguments suggesting that section 1101(a)(48)(A) eliminates the BIA's policy that certain expunged convictions may not serve as the basis for removal were unpersuasive. *See*

Lujan-Armendariz, 222 F.3d at 742. Other circuit courts have found the Ninth Circuit's analysis somewhat terse and itself unpersuasive. *See Gill v. Ashcroft,* 335 F.3d 574, 578 (7th Cir. 2003) (disagreeing with *Lujan-Armendariz,* and holding that section 1101(a)(48)(A) abolishes for immigration law purposes any special treatment for deferred dispositions in first offender drug offenses); *Vasquez-Velezmoro v. United States Immigration and Naturalization Service,* 281 F.3d 693, 697 (8th Cir. 2002) (declining to adopt the reasoning of *Lujan-Armendariz* and noting "that whether the [section] 1108(a)(48)(A) [sic] definition of conviction implicitly repealed the FFOA, so that aliens whose convictions are expunged under the FFOA have convictions under immigration law, is an unsettled question"). *Lujan-Armendariz* also found "that the benefits of the [FFOA should] be extended to aliens whose offenses are expunged under state rehabilitative laws, provided they would have been eligible for relief under the [FFOA] had their offenses been prosecuted as federal crimes." 222 F.3d at 749. On appeal in the cases now before this Court, the BIA applied its holding in *Roldan* and held that even first time simple drug possession offenses that are expunged under a state rehabilitative statute are convictions under section 101(a)(48)(A) of the INA. *See Salazar-Regino,* 23 I. & N. 223.

In addition to the above case law history concerning the definition of conviction, federal circuit courts of appeal have also grappled with defining what constitutes an "aggravated felony" for the purpose of immigration law. Citing *United States v. Hernandez-Avalos,* 251 F.3d 505 (5th Cir. 2001) the BIA determined in *Salazar-Regino* that the offense of simple possession under Texas law, even with attendant deferred adjudication, constituted an

aggravated felony in the Fifth Circuit. *See Salazar-Regino,* 23 I. & N. 223. The Fifth Circuit in *Hernandez-Avalos* stated, "we believe Congress intended that state drug convictions [for possession of a controlled substance] be included in the definition of "aggravated felony." 251 F.3d at 508. In making this determination, the Fifth Circuit applied its earlier holding in *United States v. Hinojosa-Lopez,* which held that for the purpose of applying the sentencing guidelines, a state drug offense that is classified as a felony under state law is an aggravated felony, despite the fact that the offense would be punishable only as a misdemeanor under federal law. *See id. See also United States v. Hinojosa-Lopez,* 130 F.3d 691 (5th Cir. 1997).

Soon after the decision in *Salazar-Regino*, the BIA issued *In re Yanez-Garcia,* 23 1. & N. Dec. 390 (BIA 2002). *Yanez-Garcia* overruled the BIA's previous decision in *Matter of K-V-D,* which held that state drug offenses could be considered aggravated felonies under immigration law consequences only if they were "analogous" to offenses punishable as felonies under the federal drug laws. *See Matter of K-V-D,* Interim Decision 3422 (BIA 1999).[4] The BIA held in *Yanez-Garcia* "that because the meaning of the phrase "drug trafficking crime" in 18 U.S.C. § 924(c)(2) is a matter of criminal federal law, [the BIA] shall defer to the interpretation given that statute by the federal circuit courts of appeals that have spoken on the issue." 23 I. & N. Dec. 390 (BIA 2002). The BIA further determined that it would adopt the interpretation used by a majority of the

[4] *K-V-D* interpreted 18 U.S.C. § 924(c)(2), which is the federal criminal statute incorporated into the aggravated felony definition by section 101(a)(43)(B) of the INA.

circuit courts for those cases arising in circuits that have not yet addressed the issue. The Fifth Circuit's interpretation of section 924(c)(2) is among the majority, and determines that an offense classified as a felony under state law constitutes a felony for immigration purposes regardless of its hypothetical classification under federal law had the alien been convicted under federal law. As the BIA noted, the Fifth Circuit explicitly rejected the legal rationale underpinning *K-V-D* when it disagreed with the BIA's interpretation of section 924(c)(2) and stated that Section 924(c)(2) should not be interpreted differently in immigration and criminal cases. *See Yanez-Garcia,* 23 I. & N. Dec. at 392 (referencing *United States v. Hernandez-Avalos,* 251 F.3d 505 (2001)).

IV. Petitioners' Arguments and Magistrate Judge's R&R

All Petitioners make four[5] arguments concerning statutory construction and constitutional violations:

1) the BIA erred as a matter of law when it applied the Fifth Circuit's decision in *Hernandez-Avalos* and held their offenses were convictions despite deferred adjudication; and the BIA incorrectly decided *Roldan* because Title 8, Section 1101(a)(48)(A) does not overrule the policy and requirements announced in *Manrique*;

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[5] Petitioners lodge a fifth argument that the Court does not reach, namely that the BIA's orders of removal violate international law and United States treaty obligations. Their brief arguments, however, fail to cite any persuasive or controlling authority. As a result, the Court does not address these arguments because Petitioners have not adequately stated a claim.

2) Petitioners' Equal Protection rights are violated when the BIA renders different removal determinations based on whether aliens are convicted for certain offenses under state or federal law, and thus the BIA should apply *Lujan-Armendariz's* determination in the Fifth Circuit; Petitioners' Equal Protection rights are violated because a circuit split exists concerning the interpretation of "aggravated felonies" under immigration law; and Petitioners' Equal Protection rights are violated because of the timing of their proceedings in conjunction with the Fifth Circuit's issuance of *Hernandez-Avalos*;

3) Petitioners' fundamental liberty interests were violated by a constellation of factors including: the new definition of conviction enacted in IIRIRA, codified in section 1101(a)(48)(A); and repeal of section 212(c) relief for those convicted of aggravated felonies. Petitioners argue these factors create a "conclusive presumption" that all LPRs convicted of these offenses are "unworthy" of remaining in the United States and such new provisions are unjustifiable and not narrowly tailored to meet compelling state need; and

4) Petitioners' procedural due process rights were violated when the BIA retroactively applied the Fifth Circuit's definition of "aggravated felonies," as determined in *United States v. Hernandez-Avalos*, 251 F.3d 505 (2001).

The Magistrate-Judge does not reach claims one through three and five, but states that "Supreme Court and Fifth Circuit precedence seemingly [have] foreclosed all of these claims." R&R, at p. 35 [Dkt. No. 28]. The Magistrate Judge grants Petitioners relief on their fourth claim, finding their procedural due process rights were violated when the BIA applied the *Hernandez-Avalos*

decision retroactively to their removal proceedings. The Magistrate Judge states, "Petitioners [sic] mandatory deportation is unlawful because it retroactively makes qualitative changes in the penalty imposed in a wholly unexpected manner." *Id.* at p. 37.

For the reasons that follow, the Court will not adopt the Magistrate Judge's determination.

V. Objection I: Magistrate Judge Erred in Finding Jurisdiction

The INS argues this Court lacks subject-matter jurisdiction to review Petitioners' statutory and constitutional challenges to findings of removability based on aggravated felony convictions where direct review is available in the court of appeals. Additionally, INS argues the Fifth Circuit appellate court actually has jurisdiction to review "the statutory and legal challenges" raised by Petitioners. To support its argument, INS cites several Fifth Circuit cases decided before the Supreme Court issued its decision in *St. Cyr. See, e.g., Requena-Rodriquez v. Pasquerell,* 190 F.3d 299, 305 (5th Cir. 1999) (holding habeas jurisdiction under transitional rules is comprised of constitutional and statutory challenges that cannot be considered on direct review by courts of appeals); *River-Sanchez v. Reno,* 198 F.3d 545, 547 (5th Cir 1999) (same). In its objections to the Magistrate Judge's R&R, the INS cites a *post-St. Cyr* Ninth Circuit case, *Baeta v. Sonchik,* 273 F.3d 1261, 1264 (9th Cir. 2001), which it argues stands for the proposition that "there is no habeas jurisdiction to review a removal order where the alien has failed to exhaust his judicial remedy of direct review." Respondents' Objections to Magistrate Judge's R&R, at p. 14.

Given the broad language concerning habeas jurisdiction used in *Immigration & Naturalization Serv. v. St. Cyr,* 533 U.S. 289, 311-13 (2001), and *Calcano-Martinez v. Immigration and Naturalization Service,* 533 U.S. 348, 351 (2001), this Court cannot determine that it lacks jurisdiction to review constitutional and statutory challenges. The Supreme Court in *St. Cyr* stated that statutory language limiting judicial review does not bar habeas jurisdiction because "[a]t no point . . . does [the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")] make express reference to § 2241. Given the historic use of § 2241 jurisdiction as a means of reviewing deportation and exclusion orders, Congress' failure to refer specifically to § 2241 is particularly significant." *Id.* at 312 n. 35. *See also Calcano-Martinez,* 533 U.S. at 351-52. Thus, the Supreme Court's decision in *St. Cyr* essentially determined that jurisdiction over constitutional and statutory issues is most appropriately raised in the district courts through habeas corpus, rather than in the courts of appeals. *See St. Cyr,* 533 U.S. at 312. *See also Cedano-Viera v. Ashcroft,* 324 F.3d 1062, 1069 (9th Cir. 2003) (citing *St. Cyr* and *Calcano-Martinez*). Courts of Appeals in other circuits have determined that IIRIRA does not preclude habeas jurisdiction. *See, e.g., Wang v. Ashcroft,* No. 02-2045, 2003 WL 255958, at *7-*8 (2d Cir. Feb. 6, 2003); *Yuthok v. U.S. Immigration & Naturalization Serv.,* 51 Fed. Appx. 204, 205 (9th Cir. Nov. 12, 2002) (concerning denial of parole); *Riley v. Immigration & Naturalization Serv.,* 310 F.3d 1253, 1255-56 (10th Cir. 2002).

Furthermore, other circuit courts have distinguished jurisdiction-related claims, appropriately decided in the

courts of appeals, and statutory and constitutional challenges appropriate for habeas review in the district courts. Additionally, they have held that the availability of an alternative forum of review does not conclusively determine, in the absence of plain Congressional intent, that habeas jurisdiction is no longer available for aliens convicted of felonies. *See, e.g., Liu v. INS,* 293 F.3d 36, 40 (2d Cir. 2002) (stating the forum availability argument simply *reinforced,* but did not determine, the conclusion that Congress had not clearly repealed habeas review and quoting *St. Cyr*, "'the plain statement rule draws additional reinforcement from other canons of statutory construction.'") (quoting *St. Cyr,* 533 U.S. at 305)); *Chmakov v. Blackman,* 266 F.3d 210, 214-15 (stating that after *St. Cyr,* "if Congress wishes to repeal habeas jurisdiction, it must satisfy two separate and independent requirements. First, that repeal must not violate the Suspension Clause. Second, that repeal must be made in clear and unambiguous language. There is simply no reason to conclude that the absence of one factor would negate the necessity for the other."). These decisions indicate that even assuming Petitioners would have an alternative forum for *complete* review of their constitutional claims, and thus no violation of the Suspension Clause would occur if habeas review was not available, Congress must expressly repeal habeas jurisdiction. Congress had expressed no such repeal here. *But cf. Seale v. INS*, 323 F.3d 150, 152-54 (1st Cir. 2003) (concluding *St. Cyr* has some ambiguous language, such that "[t]he question remains open whether the existence of another available judicial forum to adjudicate the merits of an alien's claim overrides the absence of a clear statement by Congress that it intended to strip the district courts of their habeas jurisdiction.").

The Fifth Circuit has not yet ruled on this precise jurisdictional issue. However, this Court finds guidance in its recent decision in *Flores-Garza v. INS,* 328 F.3d 797, 803 (5th Cir. 2003). After determining that it lacked jurisdiction under IIRIRA because of the jurisdiction-stripping provision, 8 U.S.C. § 1252(a)(2)(C), the Court of Appeals considered whether the district court had jurisdiction to consider constitutional and statutory challenges, and determined that the district court's habeas jurisdiction "is another matter altogether." One reading of this decision is that habeas corpus jurisdiction in the district courts is not contingent upon a determination that the appeals court lacks jurisdiction.

Finally, despite the Fifth Circuit's "jurisdiction to review jurisdictional facts and determine the proper scope of its own jurisdiction," not all of Petitioners' constitutional and statutory claims would be reviewed and resolved. *Flores-Garza,* 328 F.3d at 802 (citation omitted). Thus, a jurisdictional inquiry would not likely be adequate to dispose of Petitioner's constitutional claims. *See, e.g., Cedano-Viera v. Ashcroft,* 324 F.3d 1062, 1069-70 (9th Cir. 2003); *Bosede v. Ashcroft,* 309 F.3d 441, 446 (7th Cir. 2002) (holding non jurisdictional related constitutional claims cannot be determined on a petition for direct review).

In light of *St. Cyr's* edict that Congress must clearly express its intent to foreclose constitutional challenges, and case law interpreting this decision, this Court determines it has jurisdiction to review Petitioners' constitutional and statutory challenges.

VI. Objection II: Magistrate Erred in Taking Additional Testimony and Considering Evidence Outside the Administrative Records

The INS argues the Magistrate Judge erred in taking new evidence concerning the Petitioners' understanding of immigration law at the time they entered their plea agreements and Petitioners' reliance on the law at that time. The INS also objects to the Magistrate Judge's consideration of counsel's unsworn representations concerning whether Petitioners were given warnings regarding the immigration consequences of entering a plea agreement. Because the Court does not grant Petitioners' any of the requested relief, the Court does not address this objection.

VII. Objection III: Magistrate Erred in Ruling that Retroactive Application of Hernandez-Avalos Violates Due Process

INS argues the Magistrate Judge's finding that retroactive application of *Hernandez-Avalos* violates due process has already been rejected by the Fifth Circuit. INS states,

> [t]he Fifth Circuit has already rejected such a claim in *Hernandez-Avalos*. There, the Fifth Circuit held that it does not violated [sic] due process, and is not fundamentally unfair, to remove an alien based on the correct construction of aggravated felony, even if his crime was not considered to be an aggravated felony at the time of his plea because of the BIA's misreading of the law. 521 F.3d at 508 ("[w]e see no reason why . . . it was fundamentally unfair to treat Hernandez as an aggravated felon because he should have the

> benefit of an agency's erroneous interpretation of applicable law").

Respondent's Objections to R&R, at pp. 23-24 [Dkt. No. 32].

Although the Court agrees ultimately with INS's contention that retroactive application of *Hernandez-Avalos* does not violate the Due Process Clause, it does not agree with its interpretation of the holding in *Hernandez-Avalos*.[6] The Fifth Circuit did *not* reject a similar retroactivity challenge because no such challenge was presented. Rather, the Petitioner, Hernandez, raised a due process challenge to an earlier removal proceeding, which was the predicate for an indictment for illegal reentry under 8 U.S.C. § 1326. Hernandez argued it was fundamentally unfair when INS agents at the time of his removal mistakenly failed to follow BIA interpretations of "aggravated felonies." At the time of Hernandez's removal, the BIA did not consider his drug conviction for simple possession under Colorado law to be an aggravated felony. Thus, had INS then followed BIA precedent, Hernandez would not have been placed in expedited removal proceedings. Stated differently, the INS applied then what has since been determined to be the correct interpretation of "aggravated felony." The Fifth Circuit went on to state in *dicta* that

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[6] The Fifth Circuit also affirmed its previous decision in *United States v. Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997) where it defined the term "drug trafficking crime," originating in 18 U.S.C. § 924(c) and referenced in the INA, to mean "that a state drug conviction is a "drug trafficking crime" (and thus an aggravated felony) if "(1) the offense was punishable under the Controlled Substances Act and (2) it was a "felony" under either state or federal law." *Hernandez-Avalos*, 251 F.3d at 508 (citing *United States v. Hinojosa-Lopez*, 130 F.3d at 694).

were it to review Hernandez's order for removal on direct appeal, it would apply today's interpretation of "aggravated felony" and not the BIA's incorrect interpretation of "aggravated felony" at the time of the removal order. It stated, "[w]e see no reason why the procedural posture of this case requires us to hold that it was fundamentally unfair to treat Hernandez as an aggravated felon because he should have the benefit of an agency's erroneous interpretation of applicable law."

This Court agrees with INS's contention that *Hernandez-Avalos* determined it would not be fundamentally unfair to use the current and correct definition of aggravated felony to a removal order on appeal. Although in some respects this distinction becomes an exercise in semantics, *Hernandez-Avalos* simply said it would not retroactively apply incorrect law to Hernandez's removal order, and hence give him the benefit of an agency's "erroneous interpretation of applicable law." *Id.* at 509. Having said this, however, the Court agrees that *Hernandez-Avalos* offers more than a little guidance on the issue of retroactivity and due process. Indeed, retroactive application of case law has long been a definitive rule espoused by the Supreme Court.

"The general principle that statutes operate prospectively and judicial decisions apply retroactively had been followed by the common law and the Supreme Court's decisions 'for near a thousand years.'" *Hulin v. Fibreboard Corp.*, 178 F.3d 316, 329 & n. 5 (5th Cir. 1999) (quoting *Kuhn v. Fairmont Coal Co.*, 5 U.S. 349, 372, 30 S.Ct. 140, 54 L.Ed. 228 (1910) (Holmes, J., dissenting)). This reasoning originates from the notion that "[w]hen [the courts] appl[y] a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and

must be given effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the court's] announcement of the rule." *Harper v. Virginia Dep't of Taxation,* 509 U.S. 86 (1993). Justice Scalia reasons in his concurring opinion in *Harper* that judges merely declare what the law is, and not what the law will be; overruling a former judicial decision is not a new declaration of law, but rather, a new decision that corrects legal error. *See Harper,* 509 U.S. at 69-70 (Scalia, J., concurring). There is no reason to believe that the usual canons of retroactivity does not apply here because these cases are being reviewed under habeas jurisdiction and not on direct review.

Historical retroactivity doctrines aside, Petitioners' procedural due process claims fail for another reason. In order to advance a due process claim, Petitioners must first establish they have a liberty or property interest at stake. The Fifth Circuit, along with others, has concluded that "[w]hile petitioners may have expected that they would be eligible for suspension of deportation, IIRIRA's amendment limited only their eligibility for discretionary relief; it did not infringe on a right that they possessed prior to its enactment." *Gonzalez-Tores v. INS,* 213 F.3d 899, 902 (5th Cir. 2000) (addressing the constitutionality of retroactive application of section 304(a) of the IIRIRA). In this respect, there is no due process "right" to eligibility for discretionary relief from removal orders. *See Lopez de Jesus v. INS,* 312 F.3d 155, 161-63 (5th Cir. 2002) (rejecting due process claim based on retroactive application of IIRIRA provision that precluded the Attorney General from granting a discretionary waiver of inadmissibility to an alien who helped a close family member enter the United States illegally unless the familial relationship

existed at the time of the act of smuggling).[7] *See also Tefel v. Reno,* 180 F.3d 1286, 1301-02 (11th Cir. 1999) ("[J]ust as [aliens] have no 'property or liberty' interest in their expectancy of receiving suspension of deportation, they enjoy no 'liberty or property' interest in being eligible to be considered for suspension. Accordingly, being ineligible for suspension does not deprive [aliens] of a constitutionally protected interest any more than having their applications for suspension denied.") (cited in *Lopez de Jesus,* 312 F.3d at 162-63)). Additionally, the Fifth Circuit has held that "it is well settled that Congress has the authority to make past criminal activity a new ground for deportation." *Moosa v. INS,* 171 F.3d 994, 1009 (5th Cir. 1999) (noting that even if an alien agreed to a deferred adjudication plea agreement "with an entirely different understanding of the immigration consequences of his plea," past criminal activity could still become a new ground for deportation).

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[7] Although the Supreme Court recently held that ineligibility for discretionary relief in the form of cancellation of removal was a harsh retroactive effect of the new statutory scheme in IIRIRA, *St. Cyr's* claims were not based on the Due Process Clause. Indeed, the Fifth Circuit articulated this point in its recent decision, *Lopez de Jesus,* 312 F.3d at 164. *St. Cyr's* holding turned on the retroactive effect of a law in the absence of clear Congressional intent, particularly in those circumstances where a defendant alien entered a plea bargain whose terms allowed him to remain eligible for discretionary relief while the government secured the benefit of an expedited resolution of the case. *See St. Cyr,* 533 U.S. at 321-22. Were the Fifth Circuit to determine Petitioners have stated a due process violation based on a protected liberty or property interest in eligibility for discretionary relief, it would have to apply *St. Cyr* to cases alleging a constitutional Due Process Clause violation. Given the discussion in the text of this decision and Fifth Circuit law, this Court does not hold *St. Cyr* has such far-reaching application.

Without a constitutionally protected interest, Petitioners cannot claim any procedural due process violation. Additionally, it is well-established that Courts may apply their decisions retroactively. Accordingly, the Court sustains INS's objection, and will not adopt the Magistrate Judge's ruling on this claim.

VIII. Petitioners' Remaining Claims

A. Equal Protection Claim

Petitioners argue their Equal Protection rights are violated when the BIA renders different removal determinations based on whether aliens are convicted for certain offenses under state or federal law, and thus the BIA should apply *Lujan-Armendariz* in the Fifth Circuit. Petitioners further argue their Equal Protection rights are violated because a circuit split exists concerning the interpretation of "aggravated felonies" under immigration law, and the timing of their proceedings in conjunction with the Fifth Circuit's issuance of *Hernandez-Avalos* bar relief.

Congress's authority over aliens is plenary. This expansive power means that courts subject classifications distinguishing groups of aliens to relaxed scrutiny under a rational basis of review. These classifications are valid unless they are arbitrary or unreasonable. Given "the need for special judicial deference to congressional policy choices in the immigration context," a "facially legitimate and bona fide reason" for different treatment will suffice to reject an equal protection claim. *Fiallo v. Bell*, 430 U.S. 787, 794, 793 (1977) (internal quotation omitted). *See also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (under a deferential rational-basis standard, the

government's different treatment will "be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.").

In requesting that this Court to adopt the reasoning in *Lujan-Armendariz,* Petitioners ask this Court to determine there is no rational basis for treating aliens whose convictions were expunged under state rehabilitative statutes differently from aliens prosecuted under federal statutes. The Ninth Circuit held in *Lujan-Armendariz* that it violated the Equal Protection Clause to withhold relief from removal to aliens who would have been eligible for relief under the FFOA had they been prosecuted under federal law, but who instead received expungements pursuant to state rehabilitative statutes. *See Lujan-Armendariz,* 222 F.3d at 742-43 & n.25.

Although the Fifth Circuit has not ruled on this issue directly, this Court finds it unlikely it would adopt the Ninth Circuit's sweeping interpretation of Equal Protection in this context. Other circuits have either avoided the issue of Equal Protection or determined that Equal Protection is not violated under these circumstances. For example, the Eighth Circuit in *Vasquez-Velezmoro v. INS,* rejected the Ninth Circuit's reasoning, and held that aliens prosecuted under state rehabilitative statutes were not similarly situated to aliens prosecuted under the FFOA. 281 F.3d 693, 697 (8th Cir. 2002). In *Vasquez-Velezmoro,* the Court determined that Petitioner's situation was not sufficiently similar to an individual eligible for treatment under the FFOA. Under the FFOA, a defendant is eligible for relief if he receives no more than a one year term of probation. 18 U.S.C. § 3607(a). Like the petitioner in *Vasquez-Velezmoro,* Petitioners in the case before this

court were sentenced to terms of probation longer than one year. Thus, they would not be eligible for treatment under the FFOA. As the Eighth Circuit determined, this difference in sentences creates a rational basis for treating petitioners differently from aliens who qualify for conviction expungements under the FFOA. *See also Fernandez-Bernal v. Attorney General of the United States*, 257 F.3d 1304, 1316-17 (11th Cir. 2001) (holding that an alien sentenced to more than one year of probation in a state court did not raise a meritorious Equal Protection claim because he was not similarly situated).

Even supposing, however, that aliens prosecuted under state rehabilitative statutes would qualify under the FFOA, the Eighth Circuit reasoned that it would still be reasonable for Congress to grant greater immigration relief for federal defendants than to state defendants because "Congress better knows and can control the pool of defendant aliens who will be eligible for immigration relief via the FFOA, than it can with state defendant aliens rehabilitated through a variety of statutes." 281 F.3d at 698.

In light of the above reasoning, this Court declines to adopt the holding of *Lujan-Armendariz*. To the extent that Petitioners raise an Equal Protection claim based on a circuit split or the timing of their proceedings, this Court knows of no authority that would support such a claim. Accordingly, Petitioners' claim for relief based on the Equal Protection Clause is denied.

B. Substantive Due Process Claim

Petitioners argue they have a "fundamental liberty interest in being able to live and work in the United

States, and in remaining here with [their] famil[ies]." They further argue their fundamental liberty interests were violated by a constellation of factors acting in conjunction: the new definition of conviction enacted in IIRIRA, codified in Section 1101(a)(48)(A); and repeal of section 212(c) relief, which abolished cancellation of removal for those convicted of aggravated felonies. Petitioners argue these factors create a "conclusive presumption" that all LPRs convicted of these offenses are "unworthy" of remaining [sic] the United States and such new provisions are unjustifiable and not narrowly tailored to meet compelling state need. Petitioners have not provided the Court with any authority that suggests they have such a broad-based fundamental liberty interest in being able to live and work in the United States. Petitioners cite to *Landon v. Plasencia,* 459 U.S. 21, 34 (1982), a procedural due process case, in attempting to demonstrate that their "weighty" liberty interest consists of the right "to stay and live and work" in the United States. Procedural due process arguments do not bolster Petitioners' claim because as the Court has already discussed in this opinion, there is no protected liberty or property interest in remaining eligible for discretionary relief under Section 1229b. Furthermore, to the extent that Petitioners cite to substantive due process cases, cited in *Plasencia,* which rejected conclusive presumptions in certain circumstances, Petitioners have not adequately argued why an alien has a fundamental right to live and work in the United States deserving of heightened scrutiny. Even if such a fundamental right exists, Petitioners have not argued why it is that Congress' broad plenary authority over immigration matters including decisions about which classes of aliens are admissible and deportable and under what circumstances does not constitute a compelling governmental

need, and thus survive heightened scrutiny. *See, e.g., INS v. Chadha,* 462 U.S. 919, 941 (1983); *Fiallo v. Bell,* 430 U.S. 787, 792 (1977) ("[T]he power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."). In short, Petitioners have not presented the Court with any compelling legal arguments or authority to support their claim.

Accordingly, Petitioners' substantive due process claim must fail.

C. Statutory Construction: BIA's Application of *Hernandez-Avalos*

Petitioners argue the BIA erred as a matter of law when it applied the Fifth Circuit's decision in *Hernandez-Avalos* and held their offenses were convictions despite deferred adjudication. Petitioners argue the Fifth Circuit's language disapproving of the BIA's decision in *Matter of K-V-D* was *dicta* and as such the BIA should have upheld and applied *Matter of K-V-D* to their cases. Additionally Petitioners assert the BIA incorrectly decided *Roldan* because Title 8, Section 1101(a)(48)(A) does not overrule the policy and requirements announced in *Manrique.*

As mentioned previously in this decision, Petitioners were found removable because they were previously convicted of aggravated felonies. *See* 8 U.S.C. § 1101(a)(48)(A) (providing a conviction consists of finding or admission of guilt plus some restraint on liberty); 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."). Under Section 1229b(a)(3) aliens convicted of aggravated felonies are ineligible for cancellation of removal.

By arguing that the BIA erred in following *Hernandez-Avalos* and thus refusing to apply *Matter of K-V-D* to their claims, Petitioners assert their convictions should not count as aggravated felonies if their convictions are not classified as felonies under state law. Simply put, this claim has been foreclosed by the Fifth Circuit and now broadly rejected by the BIA. In fact, Petitioners cite no other reason for this Court to hold the BIA erred in refusing to apply *Matter of K-V-D* to their cases other than the fact that the Fifth Circuit's disapproval of *K-V-D* amounted to *dicta*. However, in *In re Yanez-Garcia*, 23 I. & N. Dec. 390 (BIA 2002), the BIA universally adopted the view that it would defer to the federal courts' interpretation of "drug trafficking crime" and thus a "drug crime that is a felony under state law but only a misdemeanor under the [Controlled Substances Act]," constitutes a "drug trafficking crime" under 18 U.S.C. § 924(c) and Section 101(a)(43)(B) of the INA, if such crime meets the definition of conviction under *federal* law. *See Hernandez-Avalos*, 251 F.3d at 509-10 (disapproving of the BIA's *former* rule that Section 924(c) should be interpreted differently in sentencing and immigration cases). *Cf. Moosa v. INS*, 171 F.3d 994, 1005-06 (5th Cir. 1999) (holding that Texas deferred adjudications constitute convictions under 8 U.S.C. § 1101(a)(48)(A) because they involve a determination of *guilt* and some restraint on liberty); *Matter of Punu*, 22 I. & N. Dec. 224 (BIA 1998) (same). Finally, as the BIA has now fully recognized, the definition of "conviction" and "aggravated felony" is determined by looking to federal law because "'[t]he immigration laws contain no . . . indication that they are to be interpreted in accordance with state law.'" *Moosa*, 171 F.3d at 1006 (citing *United States v. Campbell*, 167 F.3d 94 (2d Cir. 1999)).

Petitioners' second statutory argument concerns whether deferred adjudication for felony possession of a controlled substance constitutes a "conviction" under the IIRIRA.[8] The BIA held in *Matter of Roldan,* Interim Decision 3377 (BIA 1999), that *Matter of Manrique,* had been superseded in 1996 by the enactment of Section 101(a)(48)(A) of the IIRIRA. 8 U.S.C. § 1101(a)(48)(A) (Supp. II 1996). However, in *Lujan-Armendariz v. INS,* 222 F.3d 728 (9th Cir, 2000), the United States Court of Appeals for the Ninth Circuit overruled *Roldan* in part and required application of the BIA's former rule in *Manrique* in that circuit. The BIA has declined to apply the holding in *Lujan-Armendariz* in circuits outside of the Ninth Circuit, and thus the BIA has determined deferred adjudication constitutes a conviction under IIRIRA. *See In re Salazar-Regino,* 23 I. & N. Dec. 223 (BIA 2002). This argument too has been foreclosed by the Fifth Circuit in *Moosa*. 171 F.3d at 1005-06 (holding Texas deferred adjudications constitute convictions under 8 U.S.C. § 1101(a)(48)(A) because they involve an adjudication of guilt and some restraint on liberty).

Accordingly, Petitioners' claims for relief based on statutory construction are denied.

IX. Conclusion

Pursuant to Federal Rule of Civil Procedure 42, this Court **CONSOLIDATES** the following civil causes of

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[8] Petitioners' arguments concerning the BIA's error in applying *Roldan,* which they assert was incorrectly decided, is presented in only a cursory fashion and presents no legal arguments or authority.

action with civil action 02cv45; 02cv114; 02cv136; 02cv138; 02cv197; 02cv198; 02cv225; 02cv228; 03cv02.

The Court **DECLINES TO ADOPT** the final determination of the R&R and **DENIES** Petitioners' habeas petitions. Accordingly, the Court makes the following rulings:

02cv45: **GRANTS** Dkt. No. 6; **DENIES** Dkt. No. 31-1; **DENIES AS MOOT** Dkt. No. 31-2; and **GRANTS** Dkt. No. 33.

02cv114: **GRANTS IN PART AND DENIES IN PART** Dkt. No. 9-1; **DENIES AS MOOT** Dkt. No. 11-1; **GRANTS** Dkt. No. 32; and **GRANTS** Dkt. No. 36-1.

02cv136: **GRANTS** Dkt. No. 4-1; **GRANTS** Dkt. No. 27-1; and **GRANTS** 31-1. 02cv138: **GRANTS IN PART AND DENIES IN PART** Dkt. No. 4-1; **DENIES AS MOOT** Dkt. No. 7-1; **GRANTS** Dkt. No. 28; and **GRANTS** Dkt. No. 32-1. 02cv197: **DENIES** Dkt. No. 9-1; and **GRANTS** Dkt. No. 26-1.

02cv198: **GRANTS** Dkt. No. 11-1; **GRANTS** Dkt. No. 27-1; and **GRANTS** Dkt. No. 31-1.

02cv225: **DENIES** Dkt. No. 8-1; **GRANTS** Dkt. No. 25-1; and **GRANTS** Dkt. No. 29-1.

02cv228: **DENIES** Dkt. No. 8-1; **GRANTS** Dkt. No. 18-1; **GRANTS** Dkt. No. 27-1; and **GRANTS** Dkt. No. 31.

03cv02: **DENIES** Dkt. No. 4-1; and **GRANTS** Dkt. No. 23-1.

DONE this 30th day of September 2003, at Brownsville, Texas.

/s/ Hilda Tagle
Hilda G. Tagle
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

LAURA ESTELLA SALAZAR-REGINO, Plaintiff, v. E.M. TROMINSKI, INS DISTRICT DIRECTOR, ET AL. Defendant.	§	CIVIL ACTION NO. B-02-45
TEODULO CANTU-DELGADILLO, Plaintiff, v. E.M. TROMINSKI, INS DISTRICT DIRECTOR, ET AL. Defendant.	§	CIVIL ACTION NO. B-02-114
DANIEL CARRIZALOS-PEREZ, Plaintiff, v. AARON CABRERA, INS ACTING DISTRICT DIRECTOR, ET AL. Defendant.	§	CIVIL ACTION NO. B-02-136

MANUEL SANDOVAL-HERRERA, Plaintiff, v. AARON CABRERA, INS ACTING DISTRICT DIRECTOR, ET AL. Defendant.	§ § § § § § § § § §	CIVIL ACTION NO. B-02-138
RAUL HERNANDEZ-PANTOJA, Plaintiff, v. JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. Defendant.	§ § § § § § § § § §	CIVIL ACTION NO. B-02-197
JOSE MARTIN OVIEDO-SIFUENTES, Plaintiff, v. JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. Defendant.	§ § § § § § § § § §	CIVIL ACTION NO. B-02-198

CESAR LUCIO Plaintiff, v. JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. Defendant.	§ § § § § § § §	CIVIL ACTION NO. B-02-225
PRAXEDIS RODRIGUEZ-CASTRO, Plaintiff, v. JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. Defendant.	§ § § § § § § § §	CIVIL ACTION NO. B-02-228
NOHEMI RANGEL-RIVERA Plaintiff, v. JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. Defendant.	§ § § § § § § § §	CIVIL ACTION NO. B-03-002

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

(Entered Mar. 26, 2003)

In the interest of judicial economy, all of the above styled causes of action will be consolidated into one Report and Recommendation thanks to their similar nature.

BACKGROUND

B-02-045 – Salazar-Regina

Laura Estella Salazar-Regino has resided in the United States since 1977, when she was six years old, and has been a lawful permanent resident ("LPR"), since 1981. Her entire family resides lawfully in the United States, including her LPR husband and four minor United States citizen children.

On January 7, 1997, Salazar-Regino pleaded guilty to simple possession of marijuana, in exchange for a grant of deferred adjudication, pursuant to Article 42.12, Section 5(a) of the Texas Code of Criminal Procedure. The Court accepted the plea bargain, withheld adjudication of guilt, and placed her on probation for a period of ten years. Salazar-Regino has an excellent work history, and, apart from the incident leading to the instant proceedings, a clean record.

At the time of her plea, the disposition brought her under the policy exception articulated in *Matter of Manrique*,[1] which was based on an analogy to the Federal First

[1] *Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995).

Offender Act ("FFOA")[2] Therefore, at the time of her offense she was not deemed deportable. Furthermore, at that time, simple possession of marijuana was not considered to be an aggravated felony, so even if she had been placed in proceedings, she would have been eligible for cancellation of removal, under 8 U.S.C. Section 1229b(a).[3]

Upon information and belief, Ms. Salazar asserts that a significant number of LPRs who were otherwise similarly situated, in that on or after October 1, 1996, they pleaded guilty to offenses involving simple possession of controlled substances, but whose guilt was adjudicated, and who therefore did not fall within the policy exception of *Matter of Manrique*, were placed in removal proceedings in this judicial district on or after April 1, 1997, and were granted cancellation of removal by the Respondents.

On December 4, 1997, the Fifth Circuit Court of Appeals decided *United States v. Hinojosa-Lopez*,[4] which held, at least for purposes of the Sentencing Guidelines, a state felony for simple drug possession constituted an "aggravated felony." About eight months later, on August 10, 1998, Respondents issued a Notice to Appear, alleging that Salazar-Regino was deportable for having been convicted both of a controlled substance, and of an aggravated felony. At her hearing on January 20, 1999, Salazar-Regino denied that she had been "convicted" of the offense, and denied both charges of deportability. The immigration judge concluded that *Matter of Manrique* had not been

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[2] *See* 18 U.S.C. § 3607.

[3] *See Matter of L-G*, 21 I&N Dec. 89 (BIA 1995). *See also Matter of K-V-D*, Interim Decision 3422 (BIA 1999).

[4] *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997).

superceded [sic] by the new Congressional definition of "conviction,"[5] and terminated proceedings. The INS, however, appealed.

While INS' appeal was pending, there were several significant developments in the law. First, on August 18, 1998, the Board of Immigration Appeals ("BIA") issued *Matter of Punu*,[6] which held that a deferred adjudication disposition constituted a "conviction" for purposes of immigration law. Then, on March 3, 1999, the BIA decided *Matter of Roldan*,[7] which held that *Matter of Manrique* had been superseded by 8 U.S.C. Section 1101(a)(48)(A).[8] Next, on December 10, 1999, the BIA issued *Matter of K-V-D*,[9] which reaffirmed *Matter of L-G*, and held that, notwithstanding *Hinojosa-Lopez*, a state felony conviction for simple possession of a controlled substance would not be construed as an aggravated felony for immigration purposes. Then, on May 11, 2001, the Fifth Circuit decided *United States v. Hernandez-Avalos*,[10] which, in strongly worded dicta, disapproved of *Matter of K-V-D*. Although the pertinent language in *Hernandez-Avalos* appears to be dicta, the Board of Immigration Appeals ("BIA") has

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[5] *See* 8 U.S.C. § 1101(a)(48)(A). The new definition of conviction was enacted on September 30, 1996, with the passing of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA").

[6] *Matter of Punu*, Interim Decision 3364 (BIA 1998).

[7] *Matter of Roldan*, Interim Decision 3377 (BIA 1999).

[8] Petitioner notes that *Matter of Roldan* was disapproved of in *Lujan-Armendariz v. INS*, on the grounds that it deprives immigrants such as Ms. Salazar of Equal Protection of the laws, since under the FFOA they would not be considered "convicted" if they had received equivalent rehabilitative treatment in federal, rather than state, court.

[9] *Matter of K-V-D*, *supra* note 3.

[10] *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001).

followed the case's conclusion, but only for cases arising within this judicial circuit. And finally, on February 8, 2002, the Third Circuit concluded that a state felony conviction for the offense of simple possession of a controlled substance is not an aggravated felony for immigration purposes.[11]

Petitioner alleges that a number of otherwise similarly situated LPRs (LPRs granted deferred adjudication for an offense involving simple possession of a controlled substance), whose cases were heard after *Roldan*, and before *Hernandez-Avalos*, were considered eligible for cancellation of removal, and were granted said relief by Respondents.

On February 14, 2002, the BIA granted the INS' appeal, and in a precedent decision, *Matter of Salazar*,[12] ordered Salazar-Regino's removal on both charges. The BIA declined therein to follow *Lujan Armendariz* outside of the Ninth Circuit, and held that, in light of *Hernandez-Avalos*, it would not apply *Matter of* K-V-D in the Fifth Circuit. Under this decision, Salazar-Regino is ineligible for any form of relief under the immigration laws, and removal would lead to her being separated from her family.

Under *Matter of Salazar*, otherwise similarly situated LPRs whose cases arose out of the Ninth Circuit are not considered to be subject to removal. LPRs whose cases arose anywhere except the Fifth Circuit continue to be

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[11] *See Germier v. Holmes*, 280 F.3d 297, 318 (3d Cir. 2002).

[12] *Matter of Salazar*, Interim Decision 3462 (BIA 2002).

eligible for relief from removal, in the form of cancellation of removal.[13]

B-02-114 – Cantu-Delgadillo

Teodulo Cantu-Delgadillo is a native of Mexico, and has been a lawful permanent resident since July 5, 1978, when he was eight years old. Cantu-Delgadillo is married to a United States citizen and has two United States citizen children. He has absolutely no family in Mexico. On November 27, 1996, Cantu-Delgadillo was granted deferred adjudication for the offense of possession of marijuana. At that time, said disposition did not render him subject to deportation.[14] Although the statutory definition of "conviction" was changed with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) on September 30, 1996, Petitioner argues that most immigration attorneys were unaware that someone like Cantu-Delgadillo could be eligible for deportation. Petitioner argues that the law was in doubt due to the fact that the *Manrique* decision was based on policy considerations, not on the definition of conviction. In fact, Petitioner stated that his criminal defense attorney told him in late 1996 that his deferred adjudication disposition would not effect his immigration status.

Nonehtheless [sic], Cantu-Delgadillo was placed in deportation proceedings, and ordered deported by an immigration judge on February 25, 1997. Cantu-Delgadillo's prior attorney appealed the case to the BIA. By decision dated December 29, 1998, the BIA noted that

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[13] 8 U.S.C. § 1229b(a).

[14] *See Matter of Manrique, supra* note 1.

it had recently held that the deferred adjudication disposition was now considered to be a conviction, under *Matter of Punu.*[15] In the 1998 decision, the Board concluded that Cantu-Delgadillo was ineligible for Section 212(c) relief, due to Section 440(d) of The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA). However, the BIA also noted that his marijuana offense would not be considered an "aggravated felony," and that he would therefore be eligible for cancellation of removal, under 8 U.S.C. Section 1229b(a). Consequently, the Board administratively closed the proceedings, pending promulgation of an anticipated regulation, which allowed the deportation proceedings to be terminated. Removal proceedings initiated so that Cantu-Delgadillo could request cancellation of removal.

However, on March 29, 2001, at the request of the INS, the Board reopened proceedings, and reinstated Cantu-Delgadillo's appeal. On August 31, 2001, the BIA dismissed that appeal, and ordered Cantu-Delgadillo's deportation. The Board's decision was based on the Fifth Circuit's decision in *United States v. Hernandez-Avalos.*[16] There was some confusion as to if and when the Board's decision was sent to counsel for Cantu-Delgadillo. Petitioner first learned of the decision in May 2002, when he was notified that he should be surrendered to INS in Houston for deportation on May 29, 2002. Arrangements were made for Cantu-Delgadillo to surrender in Harlingen, Texas, since he and his counsel are residents of the Rio Grande Valley. Once he had been surrendered, his counsel filed the instant habeas action.

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[15] *See Matter of Punu, supra* note 6.

[16] *United States v. Hernandez-Avalos, supra* note 10.

B-02-136 – Carrizalos-Perez

Daniel Carrizales-Perez is a native of Mexico, and entered the United States as a lawful permanent resident on or about December 21, 1983. Carrizales-Perez has resided in the United States continuously since he entered the country. Other than his father, whose whereabouts are unknown, Carrizales-Perez's entire family is lawfully in the United States. Petitioner has a steady history of employment and is currently purchasing the family home.

On or about June 10, 1997, pursuant to a plea bargain, Carrizales-Perez pleaded guilty to the offense of simple possession of marijuana in Brooks County, Texas. Adjudication of guilt was deferred, and he was placed on probation. At that time, this disposition did not render him subject to removal.[17]

Although IIRIRA, which enacted Section 101(a)(48)(A), had converted most deferred adjudications into convictions, *Manrique* was not based on a lack of finality in the criminal proceedings, but rather on an analogy to the Federal First Offender Act (FFOA), which precluded that there was a "conviction" in such cases. Therefore, Petitioner states that no reason existed for Carrizales-Perez to believe that *Manrique* would be abrogated, and that he would be considered "convicted" of the offense. Petitioner argues that even if Carrizales-Perez should have foreseen this change in BIA policy, his disposition still ensured his eligibility for discretionary relief in the form of cancellation of removal.[18]

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[17] *See Matter of Manrique, supra* note 1.

[18] *See Matter of L-G, supra* note 3; *Matter of K-V-D, supra* note 3.

In resolving his criminal case, Carrizales-Perez relied on the fact that his disposition carried no adverse immigration consequences, and that once he fulfilled the conditions of his probation, the charges would be dismissed. Petitioner claims that if he had known, or even suspected, that his disposition would later be interpreted as causing mandatory deportation with no possibility of relief, or even the possibility of ever returning to the United States legally, he would have fought the charges. INS also understood at that time that this disposition did not render Carrizales-Perez removable, as seen by the fact that removal proceedings were not instituted until after the issuance of *Matter of Roldan*,[19] in which the BIA concluded that the policy exception adopted in *Manrique* had been superceded [sic] by Section 101(a)(48)(A) of the Act, which redefined "conviction" for immigration purposes.[20]

However, on May 4, 2000, a Notice to Appear was issued for Carrizales-Perez. It alleged, and Petitioner conceded, the above facts relating to nationality and entry. It also alleged that he had been "convicted" of possession of marijuana. Removability was charged under both Section 237(a)(2)(B)(i), for conviction of an offense relating to a controlled substance, and Section 237(a)(2)(A)(iii) for conviction of an aggravated felony, to wit, a drug trafficking offense.

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[19] *Matter of Roldan, supra* note 7.

[20] *Roldan* was reversed in the Ninth Circuit by *Lujan-Armendariz v. INS* and *Roldan-Santoya v. INS*, 222 F 3d 728 (9th Cir. 2000). The BIA declined to apply that decision nationwide in *Matter of Salazar, supra* note 12, which is also under review and being addressed in this Report and Recommendation.

Carrizales-Perez initially contested removability, but was dissuaded by the ruling of the immigration judge that, if there had been no other controlled substance offense, the Court would find that he had not been convicted of an aggravated felony, and that he was eligible for cancellation of removal. As the judge stated at the hearing on December 15, 2000:

> [I]f he's only been convicted of one offense, possession of a controlled substance, the Court will find that's not an aggravated felony. . . . The offense is possession of a controlled substance. If that's the only offense that he had – dealing with a controlled substance – there's no question that the case is not an aggravated felony, and there's no question that he would be eligible for cancellation of removal.[21]

INS acknowledged that there was no indication of any other controlled substance violation, and withdrew the aggravated felony charge[22] The Judge then adjured counsel for Carrizales-Perez to plead to the allegations and the remaining charge, and promised "a date for the filing of the application for relief[23] Based on these assurances, Petitioner admitted that he had been "convicted" of the marijuana offense, and conceded removability under the controlled substance charge. The immigration court scheduled an appearance to file the application, and June 8, 2001, was the date set for the hearing on the merits of that application. On June 8, 2001, Carrizales-Perez appeared ready to proceed. However, based on the recent

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[21] Immigration Transcript at 7, 8.

[22] Immigration Transcript at 8, 9.

[23] Immigration Transcript at 9.

decision of the Fifth Circuit in *United States v. Hernandez-Avalos*,[24] the judge allowed INS to "reinstate" the aggravated felony charge and found that it had been sustained. Therefore, the judge found that Carrizales-Perez was ineligible for relief, and ordered his removal from the United States.

In *Hernandez-Avalos*, the Fifth Circuit held that for purposes of the Sentencing Guidelines, whether an offense was a felony (and therefore an aggravated felony), would be determined by whether the person was considered to have been convicted of a felony under state law. The Court also criticized *Matter of K-V-D*, and reaffirmed *Matter of L-G*, under which this question was resolved by analogy to federal law. The criticism of *K-V-D* was very strongly worded dicta.[25]

Moreover, *Hernandez-Avalos*, did not, as the immigration judge indicated, hold that all convictions for simple possession of a controlled substance would be treated as felonies. Rather, the decision held that state law would be determinative. The retroactive application of the principles enunciated in *Hernandez-Avalos*, the Petitioner argues, raise reliance issues, similar to those which the Supreme Court characterized in *INS v. St. Cyr*,[26] as creating serious constitutional problems.

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[24] *United States v. Hernandez-Avalos, supra* note 10.

[25] *See Hernandez-Avalos*, 251 F.3d at 509. [I]f we were reviewing Hernandez's removal order on direct appeal, and if the issue of statutory interpretation were properly preserved for review, we would hold that the BIA's interpretation of section 924(c) is plainly incorrect and that Hernandez was an aggravated felon. *Id.*

[26] *INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271 (2001).

Carrizales-Perez filed a timely appeal from the immigration judge's decision, and the appeal was dismissed by the BIA on June 7, 2002. The Board rejected Carrizales-Perez's statutory arguments, and noted that it was without jurisdiction to consider his constitutional claims.

Petitioner asserts that a significant number of long-term LPRs who were otherwise similarly situated, in that on or after October 1, 1996, they pleaded guilty to offenses involving simple possession of a controlled substance, but whose guilt was adjudicated, and who therefore did not fall within the policy exception of *Matter of Manrique* were placed in removal proceedings in this judicial district on or after April 1, 1997, and were granted cancellation of removal by Respondents prior to the issuance of *United States v. Hernandez-Avalos.*

B-02-138 – Sandoval Herrera

Manuel Sandoval-Herrera is under an administratively final order of removal, and is a native of Mexico. He entered the United States as an LPR on or about July 25, 1988, and has resided here continuously since that date. Sandoval-Herrera's entire family is lawfully in the United States, and Petitioner has a history of steady employment.

On or about November 7, 1996, Sandoval-Herrera pleaded guilty to the offense of simple possession of cocaine in Cameron County, Texas. The offense was committed on June 22, 1996. He was placed on probation, and at the time, the offense was not considered to be an aggravated felony. Therefore, he was eligible for relief from

removal under *Matter of L-G.*[27] In resolving the criminal case, Petitioner contends that he relied on the fact that this disposition permitted him to seek relief from deportation. Had he known, or even suspected, that it would later be interpreted as causing mandatory removal, with no possibility of relief, he asserts that he would have fought the charges.

A Notice to Appear was issued on July 14, 1997. It alleged, and Sandoval-Herrera conceded, the above facts relating to nationality and entry. It also alleged that he had been "convicted" of possession of a controlled substance, to wit, cocaine. Removability was charged under 8 U.S.C. Section 1227(a)(2)(B)(i), for conviction of an offense relating to a controlled substance. Sandoval-Herrera urged that he was not subject to removal, in accordance with *Matter of Manrique*,[28] and, in the alternative, requested an opportunity to seek relief in the form of cancellation of removal, under 8 U.S.C. Section 1229b(a).

While his case was pending before the immigration judge, the Fifth Circuit issued *United States v. Hinojosa-Lopez.*[29] Due to the fact that possession of any amount of cocaine is a felony in Texas, the immigration judge concluded that *Matter of L-G* was invalid and that Sandoval-Herrera was ineligible for release. Therefore, on January 15, 1999, the judge ordered that he be removed to Mexico. Sandoval-Herrera filed a timely appeal to the BIA. Shortly thereafter, the BIA issued *Matter of K-V-D*,[30] concluding

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[27] *Matter of L-G, supra* note 3.

[28] *See Matter of Manrique, supra* note 1.

[29] *See Hinojosa-Lopez, supra* note 4.

[30] *See Matter of K-V-D, supra* note 9.

that the term "aggravated felony" could have different meanings within the context of immigration law and the sentencing guidelines, and essentially reaffirmed *Matter of L-G.*[31] Under this decision, Sandoval-Herrera was still eligible for cancellation of removal. However, the Board did not immediately adjudicate his appeal. Rather, it remained pending until April of 2002.

While Sandoval-Herrera's appeal was pending at the BIA, the Fifth Circuit issued *United States v. Hernandez-Avalos,*[32] which reaffirmed *United States v. Hinojosa-Lopez.*[33] The Court also criticized *Matter of K-V-D*, under which the question of whether a crime was to be considered an aggravated felony was resolved by analogy to federal law. The criticism of *K-V-D* was dicta, and Sandoval-Herrera asserts that the retroactive application of *Hernandez-Avalos* raises reliance issues of a constitutional dimension, similar to those characterized in *INS v. St. Cyr.*[34] Nonetheless, the BIA dismissed Sandoval-Herrera's appeal on April 3, 2002, and ordered his removal to Mexico.

As in the related cases, Petitioner asserts that a significant number of long-term LPRs who were otherwise similarly situated, in that on or after October 1, 1996, they pleaded guilty to offenses involving simple possession of a controlled substance and were placed in removal proceedings in this judicial district on or after April 1, 1997, were granted cancellation of removal by Respondents prior to

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[31] *See Matter of L-G, supra* note 3.

[32] *See Hernandez-Avalos, supra* note 10.

[33] *See Hinojosa-Lopez, supra* note 4.

[34] *See St. Cyr, supra* note 26.

the issuance of *United States v. Hernandez-Avalos.* Petitioner also maintains that given his lengthy residence in the United States, his strong family ties, steady employment history, and other equities, it is highly likely that he would have earned cancellation of removal had he received the opportunity to apply for said form of relief.

B-02-197 – Hernandez Pantoja

Raul Hernandez-Pantoja became an LPR of the United States on December 1, 1990. Hernandez-Pantoja has one United States citizen son. On February 11, 1988, Hernandez-Pantoja was given seven years probation, and ordered to pay a $500.00 fine in Harris County after entering a plea of guilty to unauthorized use of a motor vehicle. Almost ten years later, in Nueces County, Hernandez-Pantoja was sentenced to seven years community supervision for possession of marijuana. The INS subsequently initiated removal proceedings and charged Hernandez-Pantoja with being inadmissible and therefore removable from the United States pursuant to 8 U.S.C. Section 1227(a)(2)(B)(i), specifically, an alien who has been convicted of an offense relating to a controlled substance.

On April 10, 2001, an immigration judge found Hernandez-Pantoja removable as alleged in the notice to appear and ineligible for relief from removal. The immigration judge denied Hernandez-Pantoja's application for relief pursuant to 8 U.S.C. Section 1229(b)(3) after he found that Hernandez-Pantoja's conviction for unauthorized use of a motor vehicle was a conviction that qualified as an aggravated felony.[35] The immigration judge never

[35] *See* 8 U.S.C. § 1229(b)(3).

made any findings as to the effect of Hernandez-Pantoja's conviction for possession of marijuana, which was a ground of removability alleged in the notice to appear. Hernandez-Pantoja reserved his right to appeal the decision of the immigration judge, and timely filed a notice of appeal before the BIA.

Hernandez-Pantoja argued before the BIA that his conviction for unauthorized use of a motor vehicle could only be considered an aggravated felony through retroactive application of the amended definition of the term, found at 8 U.S.C. Section 1101(a)(43)(G). He further asserted that BIA precedent decisions clearly established that unauthorized use of a motor vehicle under the Texas Penal Code is not an aggravated felony.

The Immigration Act of 1990, the controlling immigration statute on the date of Hernandez-Pantoja's conviction, does not include unauthorized use of a vehicle as an aggravated felony, and imposes temporal limitations on the definition. Had Hernandez-Pantoja been placed in proceedings any time prior to 1997, his conviction would not have been considered an aggravated felony. Due to the fact that unauthorized use of a vehicle is not considered a crime involving moral turpitude, Hernandez-Pantoja would not have been rendered deportable as a result of his conviction in 1988.[36]

Hernandez-Pantoja urged the BIA to remand his matter to the immigration judge in order to permit him to apply for relief pursuant to 8 U.S.C. Section 1229(b). On June 21, 2002, the BIA dismissed Hernandez-Pantoja's

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[36] *See Matter of M*, 2 I&N 686 (BIA 1946).

appeal, yet found that his conviction for unauthorized use of a motor vehicle was not an aggravated felony. Nevertheless, the BIA concurred with the result reached by the immigration judge. The BIA concluded that Hernandez-Pantoja was ineligible for relief from removal due to his conviction for possession of marijuana, pursuant to *Matter of Salazar.* Petitioner claims that the BIA decision in his case violates substantive Due Process guarantees of "fair notice," and therefore the BIA's decision should be vacated.

Hernandez-Pantoja argues that the BIA's ruling is fundamentally unfair because when Hernandez-Pantoja applied for Cancellation of Removal, the BIA had not yet held that possession of marijuana was an aggravated felony. The immigration judge erroneously concluded that Hernandez-Pantoja's conviction for unauthorized use of a vehicle was an aggravated felony, which rendered him ineligible for cancellation. Therefore, Petitioner argues, he was denied an opportunity to apply for relief for which he was eligible under the state of the law on the date he requested that relief. By the time the BIA found that unauthorized use of a vehicle was not an aggravated felony, the BIA had already ruled that possession of marijuana was an aggravated felony in *Matter of Salazar*, and the Fifth Circuit had reached its decision in *Hernandez-Avalos.*

B-02-198 – Oviedo-Sifuentes

Jose Oviedo-Sifuentes is a native and citizen of Mexico. He entered the United States as an LPR on or about November 23, 1994, and has resided in the United States since that date. His father and two minor children are United States citizens, and his mother and seven

siblings are all LPRs. He has a history of steady employment, and supports his dependents.

On July 13, 1999, pursuant to a plea bargain, Oviedo-Sifuentes pleaded guilty in Refugio County, Texas, to the offense of simple possession of less than one gram of cocaine, which had been found in the vehicle which he was driving. Adjudication of guilt was deferred and he was placed on probation for two years.[37] Although IIRIRA, which enacted Section 1101(a)(48)(A), essentially removed the element of finality from the definition of conviction; Petitioner argues that *Matter of Manrique* was not based on a lack of finality of the criminal proceedings, but an analogy to the FFOA, which precluded a finding that there was a "conviction" in such cases.

On July 13, 1999, a Notice to Appear was also issued for Oviedo-Sifuentes. It alleged, and Oviedo-Sifuentes conceded, the above facts relating to nationality and entry. It also alleged, and he denied, that he had been "convicted" of possession of cocaine. However, the immigration judge found that all allegations, including the charge, had been established, and ordered Oviedo-Sifuentes' removal to Mexico. Petitioner filed a timely appeal to the BIA.

Oviedo-Sifuentes argued to the BIA that he fell within the policy exception carved out by *Matter of Manrique*,[38]

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[37] Deferred adjudication was previously not considered to be a conviction. *See Martinez-Montoya v. INS*, 904 F.2d 1018 (5th Cir. 1990); *see also Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988). Further, under *Matter of Manrique, supra* note 1, deferred adjudication for the offense of simple possession of a controlled substance was not considered to render one subject to deportation.

[38] *See Matter of Manrique, supra* note 1.

and that proceedings should be terminated, notwithstanding *Matter of Roldan*,[39] wherein the Board concluded that the policy exception adopted in *Manrique* had been superceded [sic] by 8 U.S.C. Section 1101(a)(48)(A), which redefined "conviction" for immigration purposes.[40] Said decision was disapproved by the Ninth Circuit in *Lujan-Armendariz v. INS* and *Roldan-Santoyo v. INS*,[41] on the grounds that it deprives residents such as Oviedo-Sifuentes of the Equal Protection of the laws.

On December 17, 2001, the presiding judge in Oviedo-Sifuentes' criminal case entered an order which stated the following:

> It is therefore hereby ORDERED, ADJUDGED AND DECREED that this cause be and is hereby DISMISSED, and that Jose M. Oviedo be DISCHARGED from deferred adjudication, and that Jose M. Oviedo is hereby released from all penalties and disabilities resulting from the deferred adjudication in this case.[42]

In *Hernandez-Avalos*,[43] the Fifth Circuit held for purposes of the sentencing guidelines that whether an offense would be considered a felony (and therefore an aggravated felony), would be determined by whether the person was considered to have been convicted of a felony under state law. The Court also criticized *Matter of K-V-D*,[44]

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[39] *See Matter of Roldan, supra* note 7.

[40] *Id.*

[41] *Lujan-Armendariz v. INS* and *Roldan-Santoyo v. INS*, 222 F.3d 728 (9th Cir. 2000).

[42] *See* Plaintiff's Exhibit C.

[43] *See Hernandez-Avalos, supra* note 10.

[44] *Matter of K-V-D, supra* note 3.

and essentially reaffirmed *Matter of L-G*,[45] under which this question was resolved by analogy to federal law. However, the strongly worded criticism of *Matter of K-V-D* in *Hernandez-Avalos* was clearly dicta. Moreover, *Hernandez-Avalos* did not hold that all convictions for simple possession of a controlled substance would be treated as felonies. Rather, the decision held that state law would be determinative. However, under state law, Oviedo-Sifuentes' deferred adjudication does not constitute a conviction. He urges that it contravenes Due Process and Equal Protection to conclude that state law should be followed in determining whether an offense is a felony, and therefore, "illicit trafficking in a controlled substance," (within the meaning of 8 U.S.C. Section 1101(a)(B)) but that state law not be followed in determining whether deferred adjudication constitutes a conviction for immigration purposes.

Nonetheless, Oviedo-Sifuentes' appeal was dismissed by the BIA on September 4, 2002. There is no way to determine whether the Board gave consideration to Oviedo-Sifuentes' arguments on appeal because it simply noted that it was affirming "the results of the decision below."[46]

B-02-225 – Lucio

Petitioner Cesar Lucio is an LPR who has resided continuously in the United States since 1980. He became a lawful temporary resident on September 3, 1987, and an

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[45] *Matter of L-G, supra* note 3.

[46] Plaintiff's Exhibit A.

LPR on March 12, 1990. Currently, Petitioner Lucio resides in Rio Hondo, Texas.

On October 16, 1999, Lucio was charged with simple possession of marijuana. He pleaded guilty to the offense on January 3, 2000. His punishment was a fine and ten years of probation. A Notice to Appear was issued on January 3, 2000. It asserted removability under 8 U.S.C. Section 1227(a)(2)(B)(i), for having been convicted of an offense relating to a controlled substance. Lucio conceded removability and sought relief in the form of cancellation of removal, under 8 U.S.C. Section 1229b(a).

On March 7, 2000, an immigration judge in Los Fresnos, Texas, found that Lucio had not been convicted of an aggravated felony and that he was statutorily eligible for cancellation of removal. However, the immigration judge denied relief in the exercise of discretion, largely on the grounds that Mr. Lucio's wife had not yet achieved LPR status,[47] Lucio filed a timely appeal to the BIA. A few weeks later, Lucia's [sic] wife became a lawful permanent resident, and his prior counsel advised the Board of that fact in conjunction with his brief on appeal.

The appeal remained pending at the BIA until October 24, 2002, when a single member of the BIA affirmed, without opinion, the "results of the decision below," which therefore became "the final agency determination."[48] Insofar as the Board summarily affirmed the decision of the immigration judge, citing 8 C.F.R. Section 3.1(a)(7), it is impossible to ascertain the exact reasoning of the Board.

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[47] *See* Plaintiff's Exhibit B.

[48] Plaintiff's Exhibit A.

However, there was a change in the interpretation of the law affecting Lucio's eligibility for such relief between the time of the immigration judge's decision, and the BIA's summary affirmance thereof.[49] Petitioner argues that even if the change in *Hernandez-Avalos* was the basis for the BIA's summary affirmance of the denial of Lucio's application for removal, said disposition was error.

Lucio argues that subsequent amendments to the United States Sentencing Guidelines have shown that the Fifth Circuit erred in its interpretation of 18 U.S.C. Section 924(c) in *Hernandez-Avalos* and that said case is no longer viable either in the immigration or Sentencing Guideline context. The definition of "aggravated felony," applicable herein is 8 U.S.C. Section 1101(a)(43)(B), incorporates the following offenses: "(B) illicit trafficking in a controlled substance (as defined in Section 102 of the Controlled Substances Act [21 U.S.C. Section 802], including a drug trafficking crime (as defined in Section 924(c) of Title 18, United States Code)."[50] Petitioner notes that the basis of this definition is "illicit trafficking in a controlled substance." Further, Lucio argues the assertion that a simple possession offense can be a drug "trafficking" crime is not only counterintuitive, but is contradicted by previous BIA precedent. Petitioner cites to the BIA decision in *Matter of Davis*, in which the court observed that "the offense of simple possession would appear to be one example of a drug related offense not amounting to the common definition of 'illicit trafficking."[51]

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[49] *See Hernandez-Avalos, supra* note 10.

[50] 8 U.S.C. § 1101(a)(43)(B).

[51] *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1990).

Petitioner further asserts that the plain language, as well as the intent of Section 1101(a)(43)(B) was to cover offenses containing an element related to *trafficking* in drugs, not simple possession.[52] Petitioner cites to *Matter of L-G*[53] and *Matter of K-V-D*[54] for the proposition that the BIA gave effect to the plain meaning, and furthered the important policy of national uniformity of the immigration laws, by construing Section 1101(a)(43)(B) as limited to offenses which would be felonies under federal law. These decisions, argues the Petitioner, had the effect of excluding simple possession offenses of all controlled substances except crack cocaine from falling under the statute.

Lucio further posits that *Hernandez-Avalos* was a sentencing guideline case, and that six months after the Fifth Circuit decision was handed down, the Guidelines were amended to give effect to the plain meaning of the language. Specifically, the Guidelines were changed in order to give effect to the plain meaning of the language by making it explicit that a "drug trafficking crime" had to include a trafficking component.[55]

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[52] *See e.g. Gerbier, supra* note 11.

[53] *See Matter of L-G, supra* note 3.

[54] *See Matter of K-V-D, supra* note 3.

[55] U.S.S.G. § 2L1.2(b)(1)(C, D), comment. The definition as adopted on November 1, 2001, reads, in relevant part, as follows: "Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute, or dispense." *Id.*

Petitioner notes that a few weeks after the Sentencing Guidelines were amended, the new provision was interpreted by Senior District Judge Justice in *United States v. Sanchez.*[56] In that case, Judge Justice applied the rule of lenity,[57] and concluded that offenses involving simple possession of a controlled substance were not "aggravated felonies" within the meaning of the amended Sentencing Guidelines. Judge Justice, in light of the dicta in *Hernandez-Avalos*, postulated that interpreting simple possession offenses as "aggravated felonies" should not be tolerated.

Petitioner contends that there should be more unity between the federal law and immigration laws. Further, Lucio acknowledges that the essential premise of the pertinent dicta in *Hernandez-Avalos* is that an offense which is considered to be an "aggravated felony" for the purposes of the Sentencing Guidelines should also be an "aggravated felony" for immigration purposes. However, Lucio argues that the converse should also be true. 18 U.S.C. Section 924(c) relates to the possession and use of firearms during the commission of "drug trafficking" offenses, and crimes of violence. In that context, Lucio notes, it may make sense to include simple possession of drugs since someone who, for example, brandishes a weapon at a police officer who is trying to arrest him or her for "simple possession" should be treated in a like manner as someone who did the same during the sale of a

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[56] *United States v. Sanchez,* 179 F.Supp.2d 689 (W.D. Tex. 2001).

[57] Due to the serious consequences that come about from deportation, particularly in the context of lawful permanent residents, the rule of lenity has also been applied to the construction of deportation statutes. *See e.g. INS v. Cardozo-Fonseca,* 94 L.Ed2d 434, 459 (1987) (reaffirming "the long standing principle of construing any lingering ambiguities in deportation statutes in favor of the alien").

small quantity of drugs to an undercover agent. However, Lucio debates the Sentencing Commission exercised a degree of common sense with respect to the importation of this definition into the immigration context, and specifically excluded offenses (which by definition are not committed with the aid of a firearm) from the definition of "drug trafficking" crimes for purposes of 8 U.S.C. Section 1326.

Consequently, Lucio asserts, the new definition of simple possession, as defined by the Sentencing Guidelines, should be applied to immigration cases as well. Petitioner argues that the injustice of a contrary interpretation is apparent not only in cases such as the one at bar, where an LPR accepted a plea of bargain at a time when such a disposition did not bar his eligibility for cancellation of removal, but also in instances where an LPR is convicted of simple possession of small amounts of cocaine. In Texas, simple possession of any "visible and measurable" amount of cocaine, no matter how trivial, is a felony.[58]

Petitioner further reasons if the dicta in *Hernandez-Avalos* were to be given effect, LPRs such as Lucio would be considered ineligible for any form of relief from deportation, no matter their equities, because their offenses are "aggravated felonies." But, if they returned unlawfully after deportation, the same offenses would not be considered "aggravated felonies" for purposes of sentencing for unlawful re-entry under 8 U.S.C. Section 1326.

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[58] *See* Tex. HEALTH & SAFETY CODE §§ 481.102(3)(D) and 481.115(d). *See also Kemp v. State*, 861 S.W.2d 44 (Tex. App. – Houston [14th Dist.] 1993) (ruling that "specks" of white powder in a bag weighing .5 milligrams was sufficient to sustain a conviction).

Petitioner also claims that serious constitutional violations are evident in this case. Specifically, Lucio argues that there is a violation of the Equal Protection Clause,[59] the constitutional right to procedural Due Process,[60] and substantive Due Process[61] in that his case involves an overbroad statute which interferes with protected family interests by means of a "conclusive

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[59] In the Ninth Circuit, deferred adjudication is not considered to be a conviction, and such persons would not even be subject to removal. *See Lujan-Armendariz v. INS, supra* note 39. In both the Second and Third Circuits, a conviction for simple possession of a controlled substance is not considered to be an aggravated felony. *See Aguirre v. INS,* 79 F.3d 142 (2d Cir. 1999); *Gerbier v. Holmes, supra* note 11.

[60] Although Petitioner acknowledges that deportation is a civil, rather than a criminal penalty; Petitioner points out that even in the context of civil cases, there are certain protections against the retroactive application of unexpected punishment. *See e.g. BMW v. Gore,* 517 U.S. 559, 574 (1996), in which the Supreme Court ruled "[e]lementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose." *Id.*

[61] Petitioner relies on cases such as *Zavydas v. Davis,* 533 U.S. 678 (2001); *Hoang v. Comfort,* 282 F.3d 1247 (10th Cir. 2002), *Kim v. Ziglar,* 276 F.3d 523 (9th Cir. 2002), and *Patel v. Zemski,* 275 F.3d 299 (3d Cir. 2001) as cases which applied retroactivity and substantive due process principles in other contexts relating to immigrants. *See also Matter of Salazar-Regino,* 23 I&N Dec. 223, 238 (BIA 2002) (Rosenberg, L., dissenting); *Landon v. Plasencia,* 459 U.S. 21, 34 (1982) (citing *Bridges v. Wixon,* 326 U.S. 135, 154 (1945) for the proposition that the right to rejoin immediate family ranks high among the interests of an individual); *Moore v. City of East Cleveland,* 431 U.S. 494, 499 (1977); and *Stanley v. Illinois,* 405 U.S. 645, 651 (1972). *Moore* and *Stanley* are fundamental rights cases involving family relationships. *Stanley* struck down a conclusive presumption and *Moore* simply concluded that the interest advanced by the state was insufficient to justify the particular intrusion into the family unit. As an LPR, Lucio correctly asserts that he enjoys the same substantive Due Process rights as citizens to develop and enjoy intimate family relationships in the United States.

presumption" that no non-citizen, regardless of his family ties and the minimal nature of his offense, is worthy of remaining in the United States.

Lucio cites *INS v. St. Cyr*[62] and *Zavydas v. Davis*[63] as cases which stand for the proposition that serious constitutional doubts should mitigate in favor of finding a statutory interpretation which would avoid reaching the constitutional concerns, even if one is required to "stretch" the statutory language in order to do so. Lucio further asserts, however, that such a statutory interpretation is clear in this case; as is the means of distinguishing *Hernandez-Avalos*. Petitioner reiterates that a BIA decision in 1990,[64] and amendments to the Sentencing Guidelines in 2001,[65] have found that simple possession of a controlled substance is not a drug trafficking crime for the purposes of 18 U.S.C. Section 924(c). Therefore, Lucio reasons, simple possession of a controlled substance should not be considered a drug trafficking crime under 8 U.S.C. Section 1101(a)(43)(B).

B-02-228 – Rodriguez-Castro

Praxedis Rodriguez-Castro has resided in the United States, and has been an LPR since 1956, when he was five years old. His entire family resides lawfully in the United States, including his wife and five United States citizen

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[62] *INS v. St. Cyr, supra* note 26.

[63] *Zavydas, supra* note 61.

[64] *Matter of Davis, supra* note 51.

[65] *See supra* note 55.

children. He has an excellent work history, and numerous other equities.

In 1984, Rodriguez-Castro was convicted of simple possession of marijuana, and in 1999, he was convicted of simple possession of between one and four grams of cocaine. On January 27, 2000, a Notice to Appear was issued and he was placed in removal proceedings based on the cocaine conviction.

At the time of his cocaine conviction, Petitioner's eligibility for cancellation of removal, under 8 U.S.C. Section 1229b(a), depended on whether the second offense would have been considered a felony under federal law.[66] Rodriguez-Castro argued before an immigration judge that, had the offense been prosecuted in federal court, it would have been treated as a misdemeanor. There was no trafficking involved, the marijuana conviction had occurred more than fifteen years previously, and he had few other "criminal history" points. Therefore, the sentence he would have received would have been less than one year. He also demonstrated that under similar circumstances, involving two convictions, the BIA had held that the person was eligible for relief.

On information and belief, Rodriguez-Castro asserts that a significant number of long-term LPRs who were otherwise similarly situated, in that on or after October 1, 1996, they were convicted of offenses involving simple possession of controlled substances, were granted cancellation of removal by Respondents. However, while Rodriguez-Castro's case was pending, there were significant

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[66] *See Matter of L-G, supra* note 3.

developments in the law. On May 11, 2001, the Fifth Circuit decided *United States v. Hernandez-Avalos*,[67] which in strongly worded dicta disapproved of *Matter of K-V-D.* Although the pertinent language in *Hernandez-Avalos* was dicta, the Board has followed its conclusion, but only for cases arising within the Fifth Circuit. In a related case, on February 8, 2002, the Third Circuit concluded in *Germier v. Holmes*,[68] that, absent a trafficking element, a felony conviction for the offense of possession of a controlled substance is not an aggravated felony for immigration purposes.

On the basis of *Hernandez-Avalos,* the immigration judge ordered Rodriguez-Castro's removal on October 19, 2001.[69] A timely appeal was filed, raising a number of statutory and constitutional issues. However, in November 2002, the BIA affirmed, without opinion, "the results of the decision below," rendering it "the final agency decision," under 8 C.F.R. Section 3.1(e)(4). Petitioner asserts that the failure of the BIA to address the issues raised by Rodriguez-Castro on appeal denied him Due Process in that there was no meaningful review.

B-03-002 – Rangel-Rivera

Nohemi Rangel-Rivera has resided in the United States since 1984, when she was approximately fourteen years old. Rangel-Rivera has been an LPR since 1985, and her entire family resides in the United States (including

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[67] *See Hernandez-Avalos, supra* note 10.

[68] *See Gerbier, supra* note 11.

[69] Plaintiff's Exhibit B.

her three minor United States citizen children). She has an excellent work history, and, apart from the incident leading to the instant proceedings, a clean record.

On March 9, 1999, pursuant to a previously negotiated plea bargain, Rangel pleaded no contest to simple possession of marijuana in exchange for a grant of deferred adjudication, pursuant to Article 42.12, Section 5(a) of the Texas Code of Criminal Procedure.[70]

Petitioner asserts that at the time of her arrest, simple possession of marijuana was not considered to be an aggravated felony, and that even if she were deportable, she would have been eligible for cancellation of removal under Section 1229b(a).[71] However, on March 17, 1999, Respondents issued a Notice to Appear, alleging that Rangel-Rivera was deportable for having been convicted of an offense relating to a controlled substance.

Petitioner claims that she relied on *Matter of L-G* in conceding deportability. Rangel-Rivera requested cancellation of removal, which was granted by Immigration Judge Howard Achtsam on May 11, 1999. INS appealed the decision to the BIA. While the appeal was pending, there were several significant developments in the law. Although she was not aware of it until much later, on March 3, 1999, the BIA decided *Matter of Roldan*,[72] which held that *Matter of Manrique* had been superceded [sic] by 8 U.S.C. Section 1101(a)(48)(A).[73] Next, on December 10, 1999, the BIA

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[70] Tex. Crim. PROC. CODE art. 42.12, § 5(a).

[71] *See Matter of L-G, supra* note 3. *See Matter of K-V-D, supra* note 3.

[72] *Matter of Roldan, supra* note 7.

[73] *See supra* note 8.

issued *Matter of K-V-D*,[74] which reaffirmed *Matter of L-G*, and held that, notwithstanding *Hinojosa-Lopez*, a state felony conviction for simple possession of a controlled substance would not be construed as an aggravated felony for immigration purposes. Then, on May 11, 2001, the Fifth Circuit decided *United States v. Hernandez-Avalos*,[75] which, in strongly worded dicta, disapproved of *Matter of K-V-D)*. Although the pertinent language in *Hernandez-Avalos* appears to be dicta, the Board of Immigration Appeals ("BIA") has followed the case's conclusion, but only for cases arising within this judicial circuit. And on February 14, 2002, the BIA issued *Matter of Salazar*[76] which, in light of *Hernandez-Avalos*, declined to follow Ninth Circuit precedent outside of the Ninth Circuit. Essentially, the Board ruled that it would not apply *Matter of K-V-D* in the Fifth Circuit. Under the Board's decision in *Matter of Salazar*, Rangel-Rivera is ineligible for any form of statutory relief, and if she is removed, will permanently be separated from her family in the United States.

INS' appeal remained pending at the BIA until December 19, 2002, when the BIA granted INS' appeal on the grounds that under the subsequent case law described above, Rangel-Rivera was no longer statutorily eligible for relief. On information and belief, Petitioner maintains that a number of otherwise similarly situated LPRs, (i.e. LPRs granted deferred adjudication for an offense involving simple possession of a controlled substance) that had cases which were fully adjudicated before *Hernandez-Avalos*, were granted statutory relief by Respondents.

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[74] *Matter of K-V-D*, *supra* note 3.

[75] *United States v. Hernandez-Avalos*, *supra* note 10.

[76] *Matter of Salazar*, *supra* note 12.

Petitioner Rangel-Rivera points out that otherwise similarly situated LPRs whose cases arose in the Ninth Circuit are not considered subject to removal, and those whose cases arose in the Second or Third Circuits continue to be eligible for relief from removal, in the form of cancellation of removal under 8 U.S.C. Section 1229b(a).[77]

Petitioner argues that her lengthy residence in the United States, which commenced at an early age, along with her strong family ties, employment history, and otherwise clean record combine to make her a strong candidate for relief. She further states that when Immigration Judge Achtsam grants relief, he is virtually never reversed on appeal. Therefore, Rangel-Rivera speculates, due to the length of time INS' appeal was pending, it is highly likely that had the BIA adjudicated INS' appeal on the merits it would have been dismissed, and the proceedings would have been terminated.

ALLEGATIONS

The following allegations have been made by at least one of the above-mentioned Petitioners:

1) STATUTORY CONSTRUCTION

(a) *Aggravated Felony* – Petitioners argue that the Board erred as a matter of law in its conclusion that *United States v. Hernandez-Avalos* controls the resolution of the question of whether a deferred adjudication disposition constitutes an aggravated felony. Petitioners further assert that the language

[77] *See Gerbier, supra* note 11. *See also United States v. Pornes-Garcia*, 171 F.3d 142 (2d Cir. 1999).

in the *Hernandez-Avalos* decision that disapproved *of Matter of K-V-D* was clearly dicta. To the contrary, Petitioners assert that the BIA correctly decided *Matter of K-V-D* and that it erred in not applying that case to the Petitioners herein.

(b) *Matter of Roldan* – Petitioners urge that, as a question of law, *Matter of Roldan* was incorrectly decided. Further, Petitioners assert that (new) 8 U.S.C. Section 1101(a)(48)(A) was not intended to, and did not, legislatively overrule *Matter of Manrique.*

2) EQUAL PROTECTION

(a) *Federal First Offender Act* – Petitioners assert, for the reasons set forth in the Ninth Circuit opinion of *Lujan-Armendariz*, that it violates Equal Protection for a determination of whether a given disposition of criminal charges for simple possession of a controlled substance renders an immigrant subject to deportation to be based solely on whether the immigrant was processed in state or federal court.

(b) *Differing Results in Different Jurisdictions* – Petitioners assert, given the national character of immigration law, that it violates Equal Protection for the results of their cases to depend solely on the federal jurisdiction in which it arose. For example, Petitioner Salazar-Regino notes that had she been placed in removal proceedings within the Ninth, rather than the Fifth Circuit, she would not be subject to removal at all. Additionally, she notes that had she been placed in such proceedings in any other jurisdiction

other than the Fifth, she would have qualified for cancellation of removal. Said form of relief, Petitioners assert, would have been earned in the exercise of discretion.

(c) *Differing Results Based on Timing of the Proceedings* – Petitioners assert that had their cases been heard between March 3, 1999, and May 11, 2001 (after the BIA issued *Matter of Roldan* and before the Fifth Circuit decided *Hernandez-Avalon)*, they would have been subject to removal, but eligible for cancellation of removal, and would have most probably earned such relief in the exercise of discretion. Petitioners argue that it violates Equal Protection for the difference between remaining in the United States as an LPR, and being removed, and thus permanently barred from returning lawfully, to be based solely on the timing of the proceedings.

3) SUBSTANTIVE DUE PROCESS

As permanent residents, Petitioners assert that they have a fundamental liberty interest in being able to live and work in the United States, and in remaining here with their families.[78] Petitioners assert that the combination of provisions enacted by IIRIRA,[79] together with the repeal of Section 212(c) of the Act, and its replacement with 8 U.S.C. Section 1229b(a), which contains an absolute prohibition on granting discretionary relief to anyone convicted of an "aggravated felony," and the overly expansive definition of what

[78] *See supra* note 61.

[79] U.S.C. § 1101(a)(48)(A).

constitutes such "aggravated felonies," represents an unconstitutional "conclusive presumption." In other words, the definition conclusively presumes that all LPRs who have been convicted of any offense in the list are unworthy of being able to stay with their families in the United States, even where the State has deemed it appropriate to grant rehabilitative treatment to a first time offender. Similarly, Petitioners argue that by failing to permit any showing of countervailing equities, these provisions are unjustifiable, as they are not sufficiently narrowly tailored to meet a compelling state interest.

4) PROCEDURAL DUE PROCESS

Petitioners also assert that the decision of the Board in their cases deprive them of Procedural Due Process, as seen by another series of Supreme Court cases involving "fair notice." To apply *Matter of Roldan* and *United States v. Hernandez-Avalos* to the Petitioners retroactively, Petitioners argue, converts a disposition which, at the time of the adjudication of guilt, carried little to no immigration consequences, into one which requires mandatory deportation. Although not "punishment" for a criminal offense, Petitioners correctly point out that deportation has long been recognized as a "penalty."[80] Deportation then becomes an additional penalty, according to Petitioners, when it is retroactively attached to the "criminal offense," not by any

[80] *See Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 497-98 (1999) (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)). Justice Ginsberg, concurring in Part I and the result wrote the following: "As this Court has long recognized, '[t]hat deportation is a penalty – at times a most serious one – can not [sic] be doubted.'" *Id.*

amendment to the statute, but by virtue of changed administrative and judicial interpretations thereof.

5) INTERNATIONAL LAW AND TREATY OBLIGATIONS

Petitioners argue that the their deportation orders violate international law, and treaty obligations between the United States and Mexico, but do not specifically point to any international laws or treaties.

Respondents have filed motions in all of the above-styled cases claiming that the district court does not have jurisdiction to hear these cases. Specifically, Respondents claim that the Petitioners may not challenge removability in habeas corpus because the court of appeals must first address the issues raised in their petitions for review.

ANALYSIS

Dealing first with the Respondent's jurisdictional motion, this Court finds that the district court is not precluded from hearing the petitions in this case. This Court retains habeas jurisdiction under Section 2241 after AEDPA. Although Respondents have taken issue with said type of action in light of 8 U.S.C. Section 1252(a)(2)(C), no post-*St. Cyr* case in any circuit holds that habeas review of constitutional claims was impermissible because such claims could have been, but were not raised on direct review (in the circuit court). Petitioners must raise substantial constitutional issues in order for this Court to

exercise jurisdiction.[81] In these cases, all of Petitioners, at the very least, have raised substantial constitutional issues in their habeas petitions, and this Court will consider said petitions on the merits.

As to Petitioners' substantive claims for relief this Court reserves judgment on Claims One through Three as well as Claim Five. However, the Court notes that Supreme Court and Fifth Circuit precedence seemingly has foreclosed all of these claims. This Court will only address Claim Four, which is one in which they are entitled to relief.

Specifically, this Court finds that Petitioners are entitled to relief because they did not receive fair and proper notice. In other words, Petitioners were unaware that their past acts would be penalized in the present, thus, their procedural Due Process rights were violated by the Board's actions in their cases. All named Petitioners should have their cases remanded to the BIA, and should be given the opportunity to apply for cancellation of removal.

The Board's past decisions have deprived the Petitioners of procedural Due Process as seen by Supreme Court cases involving "fair notice." To apply *Hernandez-Avalos* to these Petitioners retroactively essentially converts a disposition which, at the time they entered into pleas, carried little to no immigration consequences into one that mandates deportation. Although not "punishment" for a criminal

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[81] *See Balogun v. Ashcroft*, 270 F.3d 274, 278 n. 11 (5th Cir. 2001). *See also Nehme v. INS*, 252 F.3d 415, 420 (5th Cir. 2001); *Lara-Ruiz v. INS*, 241 F.3d 934, 939 (7th Cir. 2001).

offense, deportation has long been recognized as a "penalty."[82]

Deportation thus becomes an additional penalty, retroactively attached to the "criminal offense," not by any amendment to the statute, but by virtue of changed administrative and judicial interpretations thereof. This occurs, even though for about half of the Petitioners[83] under state law there is no conviction, and never will be one, if they successfully complete deferred adjudication. However, even though the other half received probation,[84] they also did not receive "fair notice," due to the fact that relief was still available to them in the form of cancellation of removal when their convictions were entered.

Petitioners mandatory deportation is unlawful because it retroactively makes qualitative changes in the penalty imposed in a wholly unexpected manner.[85] As espoused by the Second Circuit in *Arce v. Walker*:[86] "the Due Process Clause protects against restraints or conditions of confinement that 'exceed[] the sentence in . . . an unexpected manner.' "[87] Due Process protections exist even

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[82] *See Reno*, 471 U.S. at 497-98.

[83] Petitioners Salazar-Regino, Cantu-Delgadillo, Oviedo-Sifuentes, and Rangel-Rivera received deferred adjudication.

[84] Petitioners Sandoval-Herrera, Carrizales-Perez, Hernandez-Pantoja, Lucie, and Rodriguez-Castro received probation.

[85] *See* Nancy Morawetz, *Rethinking Retrocative* [sic] *Deportation Laws and the Due Process Clause*, 73 NYU Law Rev. 97 (1998).

[86] *Arce v. Walker*, 139 F.3d 329 (2d Cir. 1998).

[87] *See id.* at 333-34 (quoting *Sandlin v. Conner*, 515 U.S. 472, 484 (1995)). *See also Sandlin*, 515 U.S. at 479 n. 4 (observing that proscribed conditions of confinement must be "qualitatively different from the punishment characteristically suffered by a person convicted of crime, and [have] stigmatizing consequences"). *See e.g. Vitek v. Jones*,

(Continued on following page)

though deportation is a civil penalty in which criminal punishment is not involved. As the Supreme Court has held in *BMW of North America v. Gore*, "[e]lementary notions of fairness enshrined in this Court's constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty a State may impose.[88]

The strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases, but the basic protection against judgments without notice afforded by the Due Process Clause is implicated by civil penalties. In these cases, for lawful permanent residents, there can be no question that deportation is a civil penalty imposed as a result of their criminal convictions for simple possession of narcotics. It therefore violates Due Process to deport these Petitioners due to a retroactive application of a new construction of a statute[89] because it imposes a severe civil penalty without prior notice.[90] As stated in *BMW of North America v. Gore*, it confounds the "elementary notions of fairness enshrined in [the Supreme Court's]

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445 U.S. 480, 493 (1980) (holding that "involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual"); *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (ruling that an inmate has a liberty interest under the Due Process Clause to refuse the involuntary administration of psychotropic drugs).

[88] *See Gore*, 517 U.S. at 574 n. 22.

[89] *See Bouie v. City of Columbia*, 378 U.S. 347, 358 (1964). The *Bouie* Court ruled if a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be applied retroactively. *Id.*

[90] *See Shaffer v. Heitner*, 433 U.S. 186, 217 (1977).

constitutional jurisprudence" which "dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose."[91]

Simple possession of controlled substances appears to now be treated *uniformly* as an aggravated felony for immigration purposes in the Fifth Circuit.[92] In other words, if any of the above-named Petitioners would have pleaded guilty after the Fifth Circuit's decision in *Hernandez-Avalos*, there is little or no doubt that they would be deemed guilty of an aggravated felony and thus be subject to removal with no form of relief available. However, as some of the Petitioners testified, at the time of their dispositions, the law regarding possession of controlled substances and whether they were to be considered aggravated felonies was very much in doubt. In fact, it is hard for this Court to believe that each one of the named Petitioners would have pleaded guilty to their simple possession charges if they knew that mandatory deportation would commence thereafter, especially given their extensive family and employment ties to the United States. There was obviously a great deal of confusion amongst the criminal bar as to whether *Matter of K-V-D* or *Hinojosa-Lopez* was controlling in the immigration context on the question of whether felony (simple) possession of controlled substances constituted an aggravated felony for immigration purposes. Counsel for the Service claims that the Petitioners were on fair notice by the mere fact that

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[91] *See Gore, supra* note 60 at 574.

[92] *See Hernandez-Avalos, supra* note 10 (holding that state law would be determinative as to the question of whether an offense would be treated as felony, and thus an aggravated felony).

they were here as a gratuity, in that "they don't have a right to be here" and it is "a privilege for them to live in the United States."[93] Therefore, they are on notice, reasons the Service, when the United States entitles them to live here, in that "they need to comply with the laws."[94] However, even the INS was unsure about the state of the law prior to *Hernandez-Avalos*, as evidenced by the Service's admission that various immigration judge's were applying the principles of IIRIRA in different ways.[95] The Service itself continued operating in many jurisdictions the exact same way it had prior to the passage of IIRIRA, and did not consider simple possession as an offense that led to mandatory deportation.

The implications of this Report and Recommendations are limited, in that it only affects legal permanent residents, in this judicial circuit, convicted of simple possession charges before the Fifth Circuit's decision in *Hernandez Avalos* and after IIRIRA took effect. This Court finds that this is the only logical solution to the problem confronting these Petitioners and the INS, especially considering the tumultuousness state of the law at the time Petitioners were found guilty of simple possession. The attorney for the Petitioners proffered to the Court that most if not all of her clients had not been informed prior to their plea that there would be immigration consequences.[96] It is a violation of an LPR's procedural due

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[93] *See* Evidentiary Hearing Transcript at 132.

[94] *Id.*

[95] *See* Evidentiary Hearing Transcript at 140.

[96] *See* Evidentiary Hearing Transcript at 112. Further, criminal defense attorneys are not considered "ineffective" if they fail to disclose

(Continued on following page)

process rights for the INS to come back years later, when the law is on more solid ground, and remove these individuals. Before *Hernandez-Avalos*, legal permanent residents similar to those applying for a writ of habeas corpus in this case were at least given the opportunity to apply for cancellation of removal even though they were convicted of offenses which led to possible deportation. In fact, as counsel for both sides pointed out, prior to *Hernandez-Avalos*, immigration judges, in their own discretion, regularly granted cancellation of removal in cases similar to the ones at bar.

RECOMMENDATION

This Court recommends that these Petitioners be entitled to reopen their cases in the BIA, in accordance with the final order of the district judge in this case. This Court recommends granting the writs based on a procedural due process violation, in that these Petitioners were not given "fair notice" that they would face mandatory deportation with no possibility of relief when they entered their guilty pleas to simple possession of controlled substances years ago.

A party's failure to file written objections to the proposed findings, conclusion, and recommendation in a magistrate judge's report and recommendation within 10 days after being served with a copy shall bar that party, except upon the grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusion accepted by the district court, provided

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that deportation is a possible consequence of their guilty plea. *See United States v. Banda*, 1 F.3d 354, 355 (5th Cir. 1993).

that the party has been served with notice that such consequences will result from a failure to object.[97]

DONE at Brownsville, Texas this 26th day of March, 2003.

/s/ Felix Recio
Felix Recio
United States Magistrate
Judge

[97] *See Douglass v. United States Automobile Association*, 79 F.3d 1415, 1417 (5th Cir. 1996)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

LAURA ESTELLA SALAZAR-REGINO, Plaintiff,	§	
v.	§	CIVIL ACTION NO. B-02-45
E.M. TROMINSKI, INS DISTRICT DIRECTOR, ET AL. Defendant.	§	
TEODULO CANTU-DELGADILLO, Plaintiff,	§	
v.	§	CIVIL ACTION NO. B-02-114
E.M. TROMINSKI, INS DISTRICT DIRECTOR, ET AL. Defendant.	§	
DANIEL CARRIZALOS-PEREZ, Plaintiff,	§	
v.	§	CIVIL ACTION NO. B-02-136
AARON CABRERA, INS ACTING DISTRICT DIRECTOR, ET AL. Defendant.	§	

MANUEL SANDOVAL-HERRERA, Plaintiff,	§	
v.	§	CIVIL ACTION NO. B-02-138
AARON CABRERA, INS ACTING DISTRICT DIRECTOR, ET AL. Defendant.	§	

RAUL HERNANDEZ-PANTOJA, Plaintiff,	§	
v.	§	CIVIL ACTION NO. B-02-197
JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. Defendant.	§	

JOSE MARTIN OVIEDO-SIFUENTES, Plaintiff,	§	
v.	§	CIVIL ACTION NO. B-02-198
JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. Defendant.	§	

CESAR LUCIO, Plaintiff, v. JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. Defendant.	§ § § § § § § § §	CIVIL ACTION NO. B-02-225
PRAXEDIS RODRIGUEZ-CASTRO, Plaintiff, v. JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. Defendant.	§ § § § § § § § §	CIVIL ACTION NO. B-02-228
NOHEMI RANGEL-RIVERA, Plaintiff, v. JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. Defendant.	§ § § § § § § § §	CIVIL ACTION NO. B-03-002

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

BE IT REMEMBERED that before the Court is the Magistrate Judge's Report and Recommendation in the above-referenced causes of action. After a de novo review

of all the files, the Magistrate Judge's Report and Recommendation is hereby **ADOPTED**. The Petitioners' Applications for a Writ of Habeas Corpus are hereby **GRANTED**. Further, their cases are hereby **REMANDED** to the Board of Immigration Appeals for further proceedings.

DONE at Brownsville, Texas this ___ day of _____, 2003.

Hilda Tagle
United States District Judge

In re Laura Estella SALAZAR-Regino, Respondent

File A24 384 420 – Harlingen

INTERIM DECISION: 3462

DEPARTMENT OF JUSTICE,
BOARD OF IMMIGRATION APPEALS

2002 BIA LEXIS 2; 23 I. & N. Dec. 223

February 14, 2002, Decided

COUNSEL:

FOR RESPONDENT: Lisa S. Brodyaga, Esquire, San Benito, Texas.

FOR THE IMMIGRATION AND NATURALIZATION SERVICE: Sylvia Alonzo, Appellate Counsel.

BEFORE: Board En Banc: Scialabba, Acting Chairman; Dunne, Vice Chairman; Hurwitz, Filppu, Cole, Grant, Ohlson, Hess, and Pauley, Board Members. Concurring Opinions: Holmes, Board Member, joined by Guendelsberger, Miller, and Osuna, Board Members; Brennan, Board Member. Concurring and Dissenting Opinion: Schmidt, Board Member. Dissenting Opinions: Rosenberg, Board Member, joined by Villageliu, and Espenoza, Board Members; Moscato, Board Member, joined by Villageliu, Board Member.

OPINION:

GRANT, Board Member:

In a decision dated February 22, 1999, an Immigration Judge terminated the removal proceedings against the respondent. The Immigration and Naturalization Service has appealed from that decision. Oral argument

was heard in this case on June 21, 2001, in Boston, Massachusetts. The appeal will be sustained.

I. BACKGROUND

A. Procedural History

The respondent is a native and citizen of Mexico who entered the United States on May 14, 1977, as a nonimmigrant visitor. Her status was adjusted to that of a lawful permanent resident on May 7, 1981. On October 11, 1996, an indictment was filed against the respondent in Texas, charging that she committed a third degree felony by "intentionally and knowingly possessing a usable quantity of marijuana in an amount of 50 pounds or less but more than 5 pounds." The respondent pled guilty to the charge on January 7, 1997, and the District Court for Chambers County deferred adjudication of guilt pursuant to article 42.12, section 5(a) of the Texas Code of Criminal Procedure, placing her on probation for 10 years.

The Service commenced proceedings in this case when it filed a Notice to Appear (Form I-862) with the Immigration Court on August 10, 1998. The Notice to Appear charged that the respondent is removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (Supp. IV 1998), as an alien convicted of an aggravated felony (a drug trafficking crime as defined in section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B) (Supp. IV 1998)), and under section 237(a)(2)(B)(i) of the Act as an alien convicted of a controlled substance violation. In removal proceedings on January 20, 1999, the respondent denied the allegation that she had been "convicted" of the Texas felony offense, and she denied both charges of removability.

B. Immigration Judge's Decision

The Immigration Judge first determined that the conviction records established that the respondent had been convicted in Texas of a felony drug possession offense. He therefore concluded that the respondent was subject to removal under section 237(a)(2)(B)(i) of the Act as an alien convicted of a controlled substance violation. However, he found that the charge under section 237(a)(2)(A)(iii) was not proved because the respondent's offense was not a felony under federal law and was therefore not an aggravated felony under *Matter of L-G-*, 20 I. & N. Dec. 905 (BIA 1994). Finally, the Immigration Judge determined that because the respondent was a first-time drug offender with a state deferred adjudication, she would have been eligible for federal first offender treatment pursuant to 18 U.S.C. § 3607 (1994) if she were prosecuted in federal court, and that she therefore met the requirements set forth in *Matter of Manrique*, 21 I. & N. Dec. 58 (BIA 1995). Consequently, he concluded that she should not be deported and terminated the proceedings against her.

C. Issues

Two issues are presented for resolution in this case. The first is whether the respondent's deferred adjudication for felony possession of marijuana constitutes a "conviction" under the Act. Subsequent to the Immigration Judge's decision, we held in *Matter of Roldan*, Interim Decision 3377 (BIA 1999), that *Matter of Manrique, supra*, had been superseded in 1996 by the enactment of section 101(a)(48)(A) of the Act, 8 U.S.C. § 1101(a)(48)(A) (Supp. II

1996).[1] However, in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the United States Court of Appeals for the Ninth Circuit overruled *Matter of Roldan* in part and required application of the Board's former rule in *Matter of Manrique* in that circuit. We must therefore determine whether to apply the Ninth Circuit's decision on a nationwide basis.

Assuming that the respondent's deferred adjudication is a conviction for immigration purposes, the second issue before us is whether her offense is an aggravated felony under section 101(a)(43)(B) of the Act.

D. Arguments on Appeal

1. Service Arguments

On the first issue, the Service asserts that *Matter of Roldan, supra*, is controlling. It relies as well on *Matter of Punu*, Interim Decision 3364 (BIA 1998), where we held that a deferred adjudication was a conviction under Texas law. According to the Service, therefore, the respondent was convicted of a drug offense for purposes of the immigration

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[1] The statutory definition of a conviction in section 101(a)(48)(A) of the Act, which was enacted by section 322 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-628 ("IIRIRA"), provides as follows:

> The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where –
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

laws and is removable under section 237(a)(2)(B)(i) of the Act.

Regarding *Lujan-Armendariz v. INS, supra*, the Service argues that the Ninth Circuit's decision is contrary to the plain language of section 101(a)(48)(A) of the Act, which takes precedence over the federal first offender statute in immigration matters. The Service also cites the Ninth Circuit's later decision in *Murillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001), a theft case in which the court deferred to the Board's interpretation of section 101(a)(48)(A) as precluding recognition of state rehabilitative expungements. In addition, it relies on several other circuit court decisions, which, according to the Service, consider section 101(a)(48)(A) to be controlling on questions regarding the effect of state rehabilitative actions. *Griffiths v. INS*, 243 F.3d 45 (1st Cir. 2001); *Herrera-Inirio v. INS*, 208 F.3d 299 (1st Cir. 2000); *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999); *United States v. Campbell*, 167 F.3d 94 (2d Cir. 1999). Finally, the Service claims that the Ninth Circuit improperly imparted constitutional status to the Board's earlier policy expressed in *Matter of Manrique, supra*, by finding our withdrawal from that policy to be a violation of equal protection. For these reasons, the Service urges us not to apply *Lujan-Armendariz* to cases outside the jurisdiction of the Ninth Circuit.

On the second issue, the Service argues that we should apply, in the immigration context, the Fifth Circuit's ruling in *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997), which held that, for sentencing guidelines purposes, a state drug offense that is classified as a felony under state law is an aggravated felony, even if it is punishable only as a misdemeanor under federal law. Acknowledging the Board's ruling to the contrary in

Matter of K-V-D-, Interim Decision 3422 (BIA 1999), the Service cites to the Fifth Circuit's recent decision in *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir.), *cert. denied*, 122 S. Ct. 305 (2001), where the court reaffirmed its holding in *United States v. Hinojosa-Lopez* and rejected our statements in *Matter of K-V-D-* that *Hinojosa-Lopez* was not binding in immigration cases. Based on this ruling, the Service asserts that the respondent has been convicted of an aggravated felony and is also removable under section 237(a)(2)(A)(iii) of the Act.

2. Respondent's Arguments

The respondent argues that *Lujan-Armendariz v. INS, supra*, was correctly decided and should be applied on a nationwide basis. She concurs with the court's conclusions (1) that when Congress enacted section 101(a)(48)(A) of the Act, it expressed no intent to amend or repeal by implication the federal first offender statute, and (2) that the principles of equal protection require that an alien who would have received the benefits of the federal statute should get the same benefits if the alien's conviction was expunged under a state rehabilitative statute. She asserts that nationwide application of the Ninth Circuit's decision would foster the uniform administration of the immigration laws if *Matter of Manrique, supra*, is reinstated. Finally, she claims that because the Government did not seek further review of *Lujan-Armendariz*, it has essentially acquiesced in the court's ruling.

In regard to the Fifth Circuit's holding in *United States v. Hernandez-Avalos, supra*, the respondent notes that the court did not apply *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837

(1984), to our decision in *Matter of K-V-D-, supra*, but merely mentioned its disapproval of our holding in dicta. She therefore asserts that, in the absence of a direct ruling on the merits of our decision in *Matter of K-V-D-*, we are not required to apply a contrary rule.

II. DISCUSSION

A. Definition of a Conviction for Immigration Purposes

The respondent pled guilty to felony possession of drugs and was granted deferred adjudication pursuant to Texas law. Under the law of the Fifth Circuit, the respondent would clearly be considered convicted of this offense. *Moosa v. INS, supra*, at 1005-06; *see also Matter of Punu, supra*. The question before us, therefore, is whether, because of the nature of the crime, we should carve out an exception to accord special treatment to first-time drug offenders who have received rehabilitative treatment under a state law. We find that, under the plain language of section 101(a)(48)(A) of the Act, we have no authority to make such an exception. Even if we did have such authority, we are unpersuaded by the Ninth Circuit's decision in *Lujan-Armendariz v. INS, supra*, that our interpretation of the statute in *Matter of Roldan* was incorrect. Accordingly, we decline to give the holding in *Lujan-Armendariz v. INS* nationwide application and will continue to apply the rule set forth in *Matter of Roldan* to cases arising outside the jurisdiction of the Ninth Circuit.

1. History of the Case Law

The concept of conviction and the treatment of state rehabilitative provisions in immigration proceedings is

long and complex. The complete history is adequately set forth in *Matter of Roldan, supra*, and it need not be repeated in full here. What follows is a brief discussion of the most significant developments of the law to date.

Prior to the enactment of section 101(a)(48)(A) of the Act, we held that an expunged conviction does not support a finding of deportability. *See Matter of Luviano*, 21 I. & N. Dec. 235, 237 (BIA 1996); *Matter of Ibarra-Obando*, 12 I. & N. Dec. 576, 578 (BIA 1966; A.G. 1967); *Matter of G-*, 9 I. & N. Dec. 159, 161 (BIA 1960; A.G. 1961). The Attorney General, making an exception to that rule, found that a drug conviction expunged under a state rehabilitative statute was not eliminated for immigration purposes. *See Matter of A-F-*, 8 I. & N. Dec. 429, 432 (BIA; A.G. 1959). However, after considering the effect of the federal first offender statute, we later announced an exception to the Attorney General's ruling for those convictions expunged under a state law that was a counterpart to the federal first offender statute. *See, e.g., Matter of Werk*, 16 I. & N. Dec. 234 (BIA 1977). In *Matter of Deris*, 20 I. & N. Dec. 5 (BIA 1989), we further refined this exception, holding that an alien whose state drug offense was expunged could avoid deportation only if the state expungement statute was an exact counterpart to the federal statute.

The Ninth Circuit subsequently criticized *Matter of Deris* as unduly narrow. *See Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994). In response to *Garberding*, we issued *Matter of Manrique, supra*. There we held that, in the interest of uniform application of the immigration laws, a first-time simple drug possession offender, whose conviction was set aside pursuant to a state statute, would not be deported if he or she would have been eligible for

treatment under the federal first offender statute had the prosecution been in federal court.

Following the enactment of a definition of a "conviction" in section 101(a)(48)(A) of the Act, however, we determined in *Matter of Roldan, supra*, that we could no longer "apply a policy exception providing federal first offender treatment to certain drug offenders who have received state rehabilitative treatment, in the face of the definition provided by Congress." *Id.* at 19. We therefore concluded that *Matter of Manrique* had been superseded by the statute.

In *Lujan-Armendariz v. INS, supra*, the Ninth Circuit partially reversed our holding in *Matter of Roldan, supra*. The court held that enactment of the definition of a conviction at section 101(a)(48)(A) of the Act did not repeal the federal first offender statute, either on its face or by implication. *Id.* at 743-46. It concluded further, on constitutional equal protection grounds, that an alien whose first-time simple drug possession offense was expunged by a state rehabilitative statute cannot be deported if first offender treatment would have been accorded under 18 U.S.C. § 3607 had the alien been prosecuted in federal court. *Id.* at 748-49. While the Ninth Circuit's holding in *Lujan-Armendariz* is limited to cases in which aliens would have been eligible for rehabilitative treatment under the federal first offender statute, the court also indicated that no expunged conviction could constitute a conviction under section 101(a)(48)(A) of the Act. *Id.* at 745-46.

Subsequent to that decision, however, a different panel of the Ninth Circuit held that a state court action setting aside a theft conviction under a rehabilitative

scheme did not eliminate the immigration consequences of that offense. *Murillo-Espinoza v. INS, supra*. Affirming our decision in *Matter of Roldan, supra*, insofar as it applies to expunged convictions in general, the court stated that while our interpretation of section 101(a)(48)(A) of the Act is not the only plausible one, it is a permissible construction of the statute entitled to deference under the principles enunciated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., supra*.

2. Statutory Language

The starting point in cases involving statutory construction must be the language employed by Congress. It is assumed that the legislative purpose is expressed by the ordinary meaning of the words used. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431 (1987); *INS v. Phinpathya*, 464 U.S. 183, 189 (1984). The plain language of both section 101(a)(48)(A) of the Act and the federal first offender statute supports our holding in *Matter of Roldan, supra*, that the definition of a conviction for immigration purposes does not give effect to state rehabilitative treatment accorded to first-time simple drug possession offenders.

Section 101(a)(48)(A) of the Act clearly states the requirements for a conviction under the immigration laws. The statute contains no exception for offenders who have been accorded rehabilitative treatment under state law. Similarly, there is no provision in the federal first offender statute relating to convictions that have been vacated, set aside, or otherwise expunged under *state* law. Nothing in either statute indicates that Congress intended to excuse a

first-time simple drug possession offender accorded rehabilitative treatment under state law from the definition of a conviction that it set forth in section 101(a)(48)(A).

The body of case law that sought to balance various policy interests and provide a uniform rule for when an alien is considered convicted for immigration purposes has now been superseded by Congress' enactment of section 101(a)(48)(A) of the Act. *See Matter of Roldan, supra.* Although this federal definition of a conviction raises the possibility that uniform results may not be accorded to similarly-situated aliens, Congress clearly chose not to provide otherwise. The mandate of Congress has been expressed by the straightforward language of the statute, and, as we concluded in *Roldan*, we are not at liberty to create exceptions where Congress has declined to provide them.[2]

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[2] In particular, we find this case distinguishable from our decision in *Matter of Devison*, Interim Decision 3435 (BIA 2000, 2001), where we determined that the New York statutory procedure in which a youthful offender is first convicted and then determined to be eligible for youthful offender status is not sufficiently analogous to an expungement to bring it within the scope of *Matter of Roldan, supra*. First, *Matter of Devison* proceeded from a long line of Board decisions holding that an adjudication of juvenile delinquency is not a "conviction" for purposes of the Act. *See, e.g., Matter of De La Nues*, 18 I. & N. Dec. 140 (BIA 1981); *Matter of Ramirez-Rivero*, 18 I. & N. Dec. 135 (BIA 1981); *Matter of C-M-*, 5 I. & N. Dec. 327 (BIA 1953); *Matter of F-*, 4 I. & N. Dec. 726 (BIA 1952). We noted that there was no indication in the text or legislative history of the IIRIRA that Congress intended to overrule this line of cases. In contrast, our decision in *Matter of Manrique, supra*, was more recent, and it is clear that Congress intended in enacting section 101(a)(48)(A) to unify the treatment of various forms of state rehabilitative provisions, specifically the one at issue in this case. Second, the New York "youthful offender" procedure at issue in *Devison* involves the *vacating* of a conviction *prior to the initial sentencing of the defendant*. As we noted in that case, the vacating of the conviction and

(Continued on following page)

3. Legislative History

Our interpretation of section 101(a)(48)(A) of the Act in *Matter of Roldan, supra*, is consistent with its legislative history. Although legislative statements have less force than the plain language of the statute, such statements are helpful to corroborate and underscore a reasonable construction of the statute. *See Weinberger v. Rossi*, 456 U.S. 25, 32 (1982); *Matter of Punu, supra*. Here, the Conference Report states that Congress enacted the definition of a conviction for the express purpose of clarifying when a conviction exists for immigration purposes, in light of the disparities caused by varying state rehabilitative procedures. H.R. Conf. Rep. No. 104-828 (1996), at 224, *available in* 1996 WL 563320, at *496. According to the report, Congress was not satisfied with how the Board dealt with cases in which a judgment of guilt or imposition of sentence was suspended, conditioned upon an alien's future good behavior. The report explicitly states that Congress intended the definition of a conviction to include cases involving state deferred adjudication laws, noting that a conviction occurs upon a finding or confession of guilt, before the term of probation begins, regardless of whether the state requires further proceedings to determine the alien's guilt or innocence if probation is violated.

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finding of youthful offender status is not contingent upon future good behavior, and it cannot be altered as a result of future delinquent or even criminal behavior. Expungements, of course, are contingent on future behavior. Thus, our holding in *Devison* is not a case of granting an "exception" to the provisions of section 101(a)(48)(A); rather, it is a recognition, such as we also made in *Matter of Rodriguez-Ruiz*, Interim Decision 3436 (BIA 2000), that the vacating of a conviction extinguishes that conviction *for reasons present at the time of the entry of the conviction* and thus removes it as a possible ground of deportation.

The legislative history of section 101(a)(48)(A) of the Act further indicates that Congress intended convictions that are expunged pursuant to state rehabilitative laws to remain convictions for immigration purposes, notwithstanding the nature of the offense. The Conference Report noted that "aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered 'convicted' have escaped the immigration consequences normally attendant upon a conviction" as a result of "a myriad of provisions [in state laws] for ameliorating the effects of a conviction." H.R. Conf. Rep. No. 104-828, at 224. Congress clearly desired to remedy this situation by passing a law to ensure that aliens whose guilt had been established could not avoid deportation as a result of some subsequent state action to eliminate the consequences of the conviction. Nothing in the legislative history suggests that Congress contemplated any exceptions, express or implicit, to the federal definition of a conviction that it mandated for immigration purposes. It would be inappropriate for us to create such exceptions where none were authorized by Congress.[3]

[3] The Ninth Circuit in *Lujan-Armendariz v. INS, supra*, and the dissent in this case cite to the legislative history's focus on the question of "deferred adjudication" as evidence that Congress intended to modify only a portion of the Board's prior case law on the subject of convictions, namely *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988), but leave intact rulings such as *Matter of Manrique, supra*. We find that the plain language of the statute, buttressed by the legislative history, clearly establishes that Congress intended to "lock in" a conviction for purposes of immigration law at the time guilt is determined and a sentence imposed. The statutory text does not indicate that this purpose was limited to schemes of "deferred adjudication," as opposed to other forms of rehabilitative treatment.

4. Equal Protection

We are unpersuaded by the Ninth Circuit's reasoning in *Lujan-Armendariz v. INS, supra*, that our withdrawal from the policy set forth in *Matter of Manrique, supra*, violates equal protection. The court found "no rational basis" for treating aliens whose convictions were expunged under state rehabilitative provisions differently from those who were prosecuted in federal court for the same offenses. *See also Garberding v. INS, supra*. This presupposes, of course, that aliens accorded first offender treatment in federal court would not be subject to removal, as the court concluded. We declined to address this issue in *Matter of Roldan, supra*, and continue to do so here.[4] However, even if we were to find that aliens treated as first offenders in federal court are exempt, we would not be bound to hold that aliens convicted in state court are likewise exempt from removal.

We have long declared that we lack authority to rule on the constitutionality of the statutes we administer. *See, e.g., Matter of Rodriguez-Carrillo*, Interim Decision 3413 (BIA 1999); *Matter of C-*, 20 I. & N. Dec. 529 (BIA 1992); *Matter of Cenatice*, 16 I. & N. Dec.162 (BIA 1977). Here, however, any extension of *Lujan-Armendariz* outside the Ninth Circuit depends on whether that court's equal

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[4] We are not aware that the Board has *ever* been presented with a case in which an alien has been charged with deportability on the basis of an adjudication under 18 U.S.C. § 3607. We are quite certain that no such case has reached the Board since the issuance of *Matter of Roldan, supra*. This may reflect prosecutorial discretion, or infrequency of use of the provisions in § 3607. In any event, as we note in the text, it is wholly speculative that this respondent, who was charged with possession of 5 to 50 pounds of marijuana, would have received such lenient treatment in the federal system.

protection rationale is shared by the United States Supreme Court or the Fifth Circuit. We therefore consider it appropriate to examine the equal protection rationale that underpins *Lujan-Armendariz*.

The Ninth Circuit's equal protection analysis is based on speculation that a first-time offender prosecuted under state law would have been granted first offender treatment in the federal courts. However, such treatment is not a right or entitlement and, indeed, is quite generous compared to many state sentencing and rehabilitative schemes. Under the federal first offender statute, no conviction is entered pending the successful completion of probation, and the length of such probation is limited by statute to 1 year. It simply cannot be known whether any particular defendant in state proceedings would have been found to warrant such treatment had they been prosecuted in federal court. We note that the respondent in this case was convicted of possession of between 5 and 50 pounds of marijuana and received a sentence of 10 years' probation, whereas the aliens at issue in *Lujan-Armendariz* received sentences that included jail time and 5 years' probation. While such sentences do not dictate what the outcome would have been in federal court, they illustrate the fruitlessness of trying to impose uniform consequences under the Act for aliens who were prosecuted for similar criminal conduct in the more than 50 jurisdictions comprising our federal system.

We find further reason for declining to follow the *Lujan-Armendariz* rule in the decision of the Eleventh Circuit in *Fernandez-Bernal v. Attorney General of the United States*, 257 F.3d 1304 (11th Cir. 2001). In that case, the court found that an alien whose first-time simple drug possession offense had been expunged under a state

rehabilitative statute could not claim that he would have been eligible for federal first offender treatment because his sentence – 2 years' probation and time in jail – exceeded the maximum penalty of 1-year probation set forth in 18 U.S.C. § 3607. Without reaching the question whether to adopt the rule in *Lujan-Armendariz*, the Eleventh Circuit concluded that aliens, such as the respondent in this case, who were sentenced in state court to more than 1 year of probation could not have received first offender treatment under the federal law. In light of our holding, it is unnecessary for us to consider whether to adopt the Eleventh Circuit's ruling outside that circuit. Nevertheless, we note that its decision clearly demonstrates the futility of seeking "uniform" results between federal and state prosecutions by engaging in speculation as to whether a particular first-time drug offender would have been adjudicated under 18 U.S.C. § 3607.

In other contexts, the Supreme Court and, indeed, the Ninth Circuit itself, have rejected the argument that equal protection requires such an attempt at uniformity. *See McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (noting that apparent disparities in sentencing are an inevitable part of our criminal justice system); *United States v. Antelope*, 430 U.S. 641, 648-49 (1977) (asserting that because Congress has constitutional power to prescribe the criminal code applicable in Indian country, it is of no consequence that the federal scheme differs from the state criminal code that is otherwise applicable within the state); *Williams v. Illinois*, 399 U.S. 235, 243 (1970) (stating that the Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences); *see also United States v.*

Laughing, 855 F.2d 659, 660 (9th Cir. 1988); *United States v. Hall*, 778 F.2d 1427, 1428 (9th Cir. 1985); *United States v. Flores*, 540 F.2d 432, 438 (9th Cir. 1976); *Schneider v. California*, 427 F.2d 1178, 1179 (9th Cir. 1970) (holding that nothing in the Constitution requires that persons convicted of the same crime receive identical penalties), *cert. denied*, 401 U.S. 929 (1971).

Furthermore, we find no indication that the Fifth Circuit, in whose jurisdiction the instant case arises, shares the Ninth Circuit's theory of equal protection as expressed in *Lujan-Armendariz*. In this regard, we note the Fifth Circuit's recent rulings that a first-time drug possession offense prosecuted as a felony under Texas state law constitutes a "drug trafficking crime" under 18 U.S.C. § 924(c), even though such an offense is only a misdemeanor under federal law and thus would not be prosecuted as a drug trafficking crime in federal court. *United States v. Hernandez-Avalos, supra* (reaffirming *United States v. Hinojosa-Lopez, supra*). Consequently, under the law of the Fifth Circuit, immigration consequences may vary dramatically depending on whether an alien's crime is prosecuted in state or federal court: the alien convicted in state court is an aggravated felon; the federal defendant is not.

In sum, neither the Supreme Court nor the Fifth Circuit follows the sweeping equal protection analysis set forth in *Lujan-Armendariz v. INS, supra*. There is no mechanism to extend the principles of the federal first offender statute to offenses expunged under state rehabilitative laws. Section 101(a)(48)(A) of the Act provides a clear and evenhanded standard for determining when a criminal proceeding in any jurisdiction has given rise to a "conviction" for purposes of the immigration laws. This

provision does not exempt first-time simple drug possession offenders who have been accorded rehabilitative treatment under state law. Accordingly, we find that we are not compelled to apply *Lujan-Armendariz* to cases arising outside the jurisdiction of the Ninth Circuit.

5. Application of Section 101(a)(48)(A) to Expungements

As we noted previously, the court in *Lujan-Armendariz v. INS, supra*, also analyzed whether, in general, a criminal conviction expunged under a state rehabilitative provision constitutes a conviction under section 101(a)(48)(A) of the Act. While acknowledging congressional intent to treat all deferred adjudications as convictions for immigration purposes prior to their expungement, the court nevertheless stated its belief that Congress did not intend to eliminate the longstanding rule that, when a conviction or finding of guilt has been expunged, it may not thereafter be used as the basis for removal. *Id.* at 745-46. The court's discussion of this issue is contrary to our holding in *Matter of Punu, supra*, and, if taken to its logical conclusion, would vitiate our holding in that case. However, the subsequent decision of another panel of the Ninth Circuit in *Murillo-Espinoza v. INS, supra*, calls into question the continued validity of much of the analysis set forth in *Lujan-Armendariz* by giving deference to our holding in *Matter of Roldan, supra*. Consequently, it provides further reason for this Board to not apply the holding of that case nationwide.

Moreover, the decisions of several other circuit courts support our interpretation in *Matter of Roldan, supra*, of section 101(a)(48)(A) of the Act, by finding that state rehabilitative expungements have no effect in immigration proceedings. Most significantly, the Fifth Circuit found

that a Texas deferred adjudication satisfies both prongs of the statutory definition and, consequently, is a conviction for immigration purposes. *Moosa v. INS, supra.* In this regard the court stated that the text of the statute "could not be more clear." *Id.* at 1005.

The First Circuit has also emphasized that the language of section 101(a)(48)(A) "leaves nothing to the imagination." *Herrera-Inirio v. INS, supra*, at 304. The court noted that the definition of a conviction clearly includes situations where adjudication of guilt has been withheld, and it concluded that a subsequent dismissal of charges based solely on rehabilitative goals does not vitiate the original admission of guilt. *See also Griffiths v. INS, supra* (holding that our interpretation of the treatment of withheld adjudications is wholly consistent with the plain language of the statute). Finally, the Second Circuit refused to recognize a Texas expungement of a drug offense, finding that no provision of the immigration laws gives controlling effect to state law or excepts from section 101(a)(48)(A) a conviction that has been vacated pursuant to a state rehabilitative statute. *United States v. Campbell, supra.*

We find clear support in these circuit court decisions for our conclusion in *Matter of Roldan* that Congress did not intend to provide any exceptions from its statutory definition of a conviction for expungements pursuant to state rehabilitative proceedings. For this reason and those stated above, we find that it would be inappropriate to give the Ninth Circuit's ruling in *Lujan-Armendariz v. INS, supra*, nationwide application.

B. Aggravated Felony

It is undisputed that the respondent pled guilty to possession of marijuana, which is a third degree felony under Texas law. Although the Fifth Circuit held that this offense is an aggravated felony for federal sentencing purposes in *United States v. Hinojosa-Lopez, supra*, we declined to apply that decision in the immigration context in *Matter of K-V-D-, supra*. However, the Fifth Circuit recently concluded that our interpretation was "plainly incorrect" in *United States v. Hernandez-Avalos, supra*, at 509. The court stated that it found no validity to giving different interpretations to the definition of a drug trafficking crime in 18 U.S.C. § 924(c) based on a distinction between sentencing and immigration cases. It therefore applied the holding in *United States v. Hinojosa-Lopez* to the alien in that case and found him to be an aggravated felon. We are bound to apply the law of the circuit in cases arising in that circuit. *See Matter of K-S-*, 20 I. & N. Dec. 715 (BIA 1993); *Matter of Anselmo*, 20 I. & N. Dec. 25 (BIA 1989). Because this case is in the Fifth Circuit, we find that the offense to which the respondent pled guilty is an aggravated felony.[5] *United States v. Hernandez-Avalos, supra; United States v. Hinojosa-Lopez, supra; see also Matter of Olivares*, 23 I. & N. Dec. 148 (BIA 2001). *But see Matter of K-V-D-, supra; Matter of L-G-*, 21 I. & N. Dec. 89 (BIA 1995); *Matter of L-G-*, 20 I. & N. Dec. 905 (BIA 1994).

[5] We do not address at this time the question whether the court's holding in *United States v. Hernandez-Avalos, supra*, applies outside the Fifth Circuit.

III. CONCLUSION

After considering the analysis set forth in *Lujan-Armendariz v. INS, supra*, we decline to apply the ruling in that decision to cases arising outside of the jurisdiction of the Ninth Circuit. We therefore conclude that, except in the Ninth Circuit, a first-time simple drug possession offense expunged under a state rehabilitative statute is a conviction under section 101(a)(48)(A) of the Act. Accordingly, pursuant to *Matter of Roldan, supra*, we find that the respondent has been convicted for immigration purposes. Inasmuch as the respondent's offense is an aggravated felony according to the rulings of the Fifth Circuit, we conclude that she is removable on both of the grounds charged. Accordingly, the Service's appeal will be sustained and the respondent will be ordered removed from the United States.

ORDER: The appeal of the Immigration and Naturalization Service is sustained.

FURTHER ORDER: The decision of the Immigration Judge is vacated, and the respondent is ordered removed from the United States.

CONCUR BY: HOLMES; BRENNAN; SCHMIDT

CONCUR:

CONCURRING OPINION: David B. Holmes, Board Member, in which John Guendelsberger, Neil P. Miller, and Juan P. Osuna, Board Members, joined

I respectfully concur in the majority's holding that the respondent is removable as charged under controlling precedent of the United States Court of Appeals for the Fifth Circuit. I also agree that the Ninth Circuit's ruling in

Lujan-Armendariz v. INS, 222 F.3d 728 (9th Cir. 2000), should not be found dispositive of this case.

Given the express language of 18 U.S.C. § 3607(b) (2000), I would likely find that a respondent, whose criminal proceedings had been dismissed under the provisions of that statute, should not be considered to have a conviction under the immigration laws. However, given the enactment in section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) (Supp. II 1996), of a statutory definition of the term "conviction," I would not extrapolate from such a limited finding that aliens whose offenses have been subject to rehabilitative treatment under any of the varying state criminal procedures would not have a "conviction" for purposes of the Act simply because they would have been eligible to have been considered for relief under 18 U.S.C. § 3607 had their offenses been prosecuted as federal crimes. My reservations in this regard are particularly strong given that the Ninth Circuit's analysis in *Lujan-Armendariz v. INS, supra*, is made without any regard to the sentences that the aliens in question actually received in the state criminal proceedings. *Cf. Fernandez-Bernal v. Attorney General of the United States*, 257 F.3d 1304, 1305 (11th Cir. 2001).

Although I joined *Matter of Manrique*, 21 I. & N. Dec. 58 (BIA 1995), and am largely of the view that the decision was appropriately decided at the time, I do not think that our analysis in that decision paid adequate attention to the actual sentences that were at issue in the state proceedings in question. Following *Matter of Manrique, supra*, the Board was soon presented by cases arising from state criminal proceedings in which the nature or circumstances of the aliens' drug possession offenses were such that they-

had been required to serve meaningful terms of incarceration followed by significant periods of probation. Although the underlying offenses were not ones that would have barred the respondents from being considered for treatment under the provisions of 18 U.S.C. § 3607 had the crimes been prosecuted in federal court, if the sentences actually imposed had been deemed the appropriate response to the crimes in question, the offenses could not have been disposed of under 18 U.S.C. § 3607. In effect, aliens convicted in state courts were given broader protection under the immigration laws from the consequences of their drug convictions than those prosecuted in federal court.

Further, although the Ninth Circuit did not find it necessary to resolve the issue under the facts of the case before it, the analysis in *Lujan-Armendariz v. INS, supra*, at 746 n. 28, indicates, for example, that a respondent required to serve a period of confinement as a result of a state drug possession conviction, followed by a lengthy period of probation that *might* eventually lead to an expungement of the conviction, could not be subjected to removal proceedings until the term of probation was completed.[1] Such a result seems entirely at odds with the present language of the Act and the now-controlling statutory

[1] In the present case, following the respondent's plea of guilty, the Texas criminal proceedings against her were deferred and she was placed on probation for a period of 10 years, subject to various conditions including participation in a drug rehabilitation program and being tested for drugs at least every 30 days. The record does not reflect that this period of probation has been terminated by the state court and the proceedings against her dismissed under the provisions of article 42.12 of the Texas Code of Criminal Procedure.

definition of a "conviction" in section 101(a)(48)(A). Accordingly, I agree that the Ninth Circuit's decision in *Lujan-Armendariz v. INS, supra*, should not be found controlling in this case.

CONCURRING OPINION: Noel Ann Brennan, Board Member

I respectfully concur in the result in this case.

DISSENT BY: SCHMIDT; ROSENBERG; MOSCATO

DISSENT:

CONCURRING AND DISSENTING OPINION: Paul Wickham Schmidt, Board Member

I respectfully concur in part and dissent in part.

I concur in Part II.B. of the majority, holding that by reason of *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir.), *cert. denied*, 122 S. Ct. 305 (2001), we are bound to follow *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997), in this case, which arises in the jurisdiction of the United States Court of Appeals for the Fifth Circuit.

Otherwise, I join the reasoning of Board Members Rosenberg and Moscato, who conclude that we should continue to follow the rule set forth in *Matter of Manrique*, 21 I. & N. Dec. 58 (BIA 1995), on a nationwide basis.

DISSENTING OPINION: Lory Diana Rosenberg, Board Member, in which Gustavo D. Villageliu, and Cecelia M. Espenoza, Board Members, joined

I respectfully dissent.

When the respondent first came to the United States in 1977, as a 6-year-old child, she was lawfully admitted as a nonimmigrant. In 1981, when she was 10, her status was adjusted to that of a lawful permanent resident. She grew up in this country and on October 11, 1996, nearly 20 years after her original entry, she was charged by the state of Texas with possession of marijuana. On January 7, 1997, the respondent pled guilty and received a deferred adjudication of guilt under article 42.12, section 5(a) of the Texas Code of Criminal Procedure, placing her on probation.

The majority rejects the opportunity to modify our decision in *Matter of Roldan*, Interim Decision 3377 (BIA 1999), *vacated in part sub nom. Lujan-Armendariz v. INS*, 222 F.3d 728, 745-49 (9th Cir. 2000), and to narrow our interpretation of section 101(a)(48) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48) (Supp. II 1996), so that it is appropriately limited to its express terms.[1] Rather than do so, the majority continues to elaborate rationalizations for extending section 101(a)(48) of the Act to encompass offenses that we previously held should not constitute a basis for deportation. *See Matter of Manrique*, 21 I. & N. Dec. 58 (BIA 1995). The majority contends that the language of section 101(a)(48) of the Act, which was added by Congress in 1996, warrants the conclusion that Congress intended us to ignore the Federal First Offender Act, 18 U.S.C. § 3607 (2000) ("FFOA"), and related policy concerns. I disagree.

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[1] *See* section 322(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-628 ("IIRIRA") (defining "conviction").

There is nothing in the plain language of this provision or its legislative history that says as much. The majority's interpretation requires us to abrogate well-established federal policy that individuals with first-time possession of controlled substance offenses should not be considered to have been convicted for any purpose. *See* 18 U.S.C. § 3607(b). Reading the statutory language in this way not only creates a conflict with other federal provisions, but results in a constricted reading that cannot be reconciled with our own recent decisions.

I. CONTEXT

As the respondent has resided in the United States since early childhood and has been a lawful permanent resident for over 20 years, her interest in not being removed from the United States is considerable. Given the potential permanence of such a removal, the stakes are high and it is worthwhile to clarify the procedural and legal posture of this case.

When the respondent denied the allegation that she had been "convicted" under section 101(a)(48)(A) of the Act at a removal hearing conducted on January 20, 1999, the Immigration Judge correctly found that a Texas deferred adjudication amounted to a conviction. *See Matter of Punu*, Interim Decision 3364 (BIA 1998). He found, however, that the respondent was not deportable under section 237(a)(2)(B) of the Act, 8 U.S.C. § 1227(a)(2)(B) (Supp. IV 1998), because the respondent would have been eligible for first offender treatment under the Federal First Offender

Act had she been prosecuted under federal law.[2] *See* 18 U.S.C. § 3607(a); *Matter of Manrique, supra.*

At the time the Immigration Judge rendered his decision, *Matter of Manrique* was controlling. In *Matter of Manrique*, we ruled that we would "extrapolate[] [the requirements of the FFOA] to apply to the various versions of state rehabilitate provisions." *Id.* at 64 (citing 18 U.S.C. § 3607). We explained that there was a clear federal policy not to deport first offenders of simple possession offenses, which had historical underpinnings dating back to the 1974 recommendation of the Solicitor General in *Matter of Andrade*, 14 I. & N. Dec. 651 (BIA 1974). *Matter of Manrique, supra*, at 63; *see also Matter of Werk*, 16 I. & N. Dec. 234 (BIA 1977). We held that, in the interest of a uniform application of the law, the exception in 18 U.S.C. § 3607(a) should be extended equally to an offender who could have obtained FFOA treatment had he been prosecuted under federal law. *Matter of Manrique, supra*, at 63-64.

Our ruling in *Manrique* did not turn on the definition of a conviction in *Matter of Ozkok*, 19 I. & N. Dec. 546 (BIA 1988), which has been displaced by the addition of section 101(a)(48) of the Act. Rather, in *Manrique*, we stated that we "would now consider a person 'convicted' under the [state deferred adjudication] statutes in those cases, *but*

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[2] The Immigration Judge also found that the drug trafficking charge under section 237(a)(2)(A)(iii) of the Act could not be sustained because the respondent's conviction would not amount to a felony under comparable federal law and did not constitute an aggravated felony under *Matter of L-G-*, 20 I. & N. Dec. 905 (BIA 1994). *Cf. United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir.), *cert. denied*, 122 S. Ct. 305 (2001).

for the policy of leniency toward first offenders." Matter of Manrique, supra, at 63 n.8 (emphasis added); *see also Matter of A-F-*, 8 I. & N. Dec. 429, 445-46 (BIA, A.G. 1956) (holding that Congress did not intend an expungement to overcome the immigration consequences of a drug conviction). Thus, we would have considered Manrique to have been "convicted" even under the pre-1996 definition of a conviction, but we found that an exception was warranted based on federal law.

Nevertheless, in *Matter of Roldan, supra*, issued after the Immigration Judge's decision, we concluded that the exception articulated in *Matter of Manrique* had been superseded by section 101(a)(48)(A) of the Act, which we found to have left "no room . . . for recognizing state rehabilitative actions in the context of immigration proceedings." *Matter of Roldan, supra*, at 20.[3] We claimed that "Congress has chosen . . . to define the term 'conviction' . . . to encompass actions which would not generally be considered convictions." *Id.* at 20.

The breadth of our interpretation of Congress' use of the term "conviction" in *Matter of Roldan, supra*, has been rejected by the United States Court of Appeals for the Ninth Circuit. *Lujan-Armendariz v. INS, supra*. Other circuit courts have acknowledged the Ninth Circuit's decision, but appear not to have adopted its ruling for case-specific reasons. *See, e.g., Fernandez-Bernal v. Attorney General of the United States*, 257 F.3d 1304 (11th Cir. 2001) (finding that *Matter of Roldan* had been called into

[3] We did not decide the effect to be given first offender treatment accorded in federal prosecutions under 18 U.S.C. § 3607 by a federal court. *See Matter of Roldan, supra*, at 16 n.9.

question, but declining to decide the issue because it decided that Fernandez-Bernal was ineligible for FFOA treatment); *Sandoval v. INS*, 240 F.3d 577, 583 (7th Cir. 2001) (finding that the strength of the Service's position has been "called into question by the Ninth Circuit's rejection of much of *Roldan-Santoyo's* reasoning"); *see also Mugalli v. Ashcroft*, 258 F.3d 52, 61 n.12 (2d Cir. 2001) (distinguishing *Lujan-Armendariz v. INS, supra*, because "there is no analogous federal relief in this case").

In *Lujan-Armendariz*, the Ninth Circuit held that the enactment of section 101(a)(48)(A) of the Act did not repeal the FFOA or supersede the *Manrique* rule. *Lujan-Armendariz v. INS, supra*, at 749. Finding no irreconcilable conflict with section 101(a)(48)(A) of the Act, the Ninth Circuit held that dispositions under the FFOA and its state counterparts constituted one of a few implied exceptions to the definition articulated in section 101(a)(48)(A). *Id.* at 746-47.[4] Thus, the court ruled that an alien who previously would have qualified for first offender treatment still qualifies after the passage of section 101(a)(48) of the Act and will not be deemed to have been convicted. *Id.* at 742-43, 745; *see also Cardenas-Uriarte v. INS*, 227 F.3d 1132, 1136 n.4 (9th Cir. 2000) ("In other words, *Matter of Manrique* survives AEDPA and IIRIRA.").

We are bound to apply the Ninth Circuit's decisions in cases arising within the Ninth Circuit. *Matter of K-S-*, 20 I. & N. Dec. 715 (BIA 1993); *Matter of Anselmo*, 20 I. & N. Dec. 25 (BIA 1989). In addition, after issuing *Matter of*

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[4] *Cf. Murrillo-Espinoza v. INS*, 261 F.3d 771 (9th Cir. 2001) (finding that because section 101(a)(48) of the Act was silent as to its effect upon expungements, the Board's interpretation that expungements were of no effect was a permissible one).

Roldan, supra, we also have recognized specific exceptions to the definition of a conviction in section 101(a)(48)(A) of the Act.

We have ruled that neither the conviction definition nor our recent precedents require us to depart from past precedents holding that "juvenile adjudications are not convictions for purposes of federal immigration law." *Matter of Devison*, Interim Decision 3435, at 9 (BIA 2000; 2001) (finding that adjudication of youthful offender status pursuant to Article 720 of the New York Criminal Procedure Law corresponds to the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 5031-5042 ("FJDA"), and does not constitute a conviction under section 101(a)(48)(A) of the Act). We also have held that a state court judgment vacating a conviction is effective in nullifying it for immigration purposes where there is no indication it was based on a rehabilitative statute. *Matter of Rodriquez-Ruiz*, Interim Decision 3436 (BIA 2000); *see also Matter of Roldan, supra*, at 15 (recognizing limitations on our decision). In these decisions, we identified administrative reasons, consistent with federal statutory exceptions and considerations of full faith and credit, to not regard certain state dispositions as convictions under section 101(a)(48)(A) of the Act.

By disregarding or misreading this context, the majority has lost the opportunity to correct the excesses of our decision in *Matter of Roldan, supra*. Consequently, the majority has perpetuated the disparate treatment of aliens whose cases arise within the jurisdiction of the Ninth Circuit and those, such as the respondent, whose cases arise outside that jurisdiction. *Cf. Matter of L-V-C-*, Interim Decision 3382, at 2 (BIA 1999) ("Because of the importance of uniform application of the law, however, we

here reconsider our holding in . . . light of the Ninth Circuit's decision. . . .").

II. STATUTORY INTERPRETATION

Unlike the majority, I am not satisfied that the interpretation of the statute we provided in *Matter of Roldan* is either reasonable or permissible. Interpretation of statutory language begins with the terms of the statute itself, and if those terms, on their face, constitute a plain expression of congressional intent, they must be given effect. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The Supreme Court specifically ruled that it was bound to "'"assume 'that the legislative purpose is expressed by the *ordinary meaning of the words used.*'"'" *INS v. Cardoza-Fonseca*, 480 U.S. 421, 431-32 (1987) (quoting *INS v. Phinpathya*, 464 U.S. 183, 189 (1984) (quoting *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)))) (emphasis added). It is only if the language is ambiguous that an agency is expected to provide a reasonable interpretation of the provision that corresponds with congressional intent. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., supra*, at 842-43.

In construing the plain language of the statute, our role is to apply the deportation provisions of the Act narrowly. *Fong Haw Tan v. Phelan*, 333 U.S. 6 (1948). The Supreme Court's edict that "we resolve the doubts in favor of that [more narrow] construction because deportation is a drastic measure and at times the equivalent of banishment or exile" is as applicable today as it was nearly 55 years ago when first pronounced. *Id.* at 10 (citing

Delgadillo v. Carmichael, 332 U.S. 388 (1947)).[5] In *Fong Haw Tan*, the Supreme Court explained that "we will not assume that Congress meant to trench on [the immigrant's] freedom beyond that which is required by the *narrowest of several possible meanings of the words used.*" *Id.* at 10 (emphasis added); *see also Costello v. INS*, 376 U.S. 120, 128 (1964) (finding that "we would nonetheless be constrained by accepted principles of statutory construction . . . to resolve that doubt in favor of the petitioner").

The Supreme Court's recent decision in *INS v. St. Cyr*, 121 S. Ct. 2271 (2001), reflects that this rule retains its force today. *Id.* at 2290 (recognizing "'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien'" in conjunction with its analysis of the first prong of the *Chevron* test (quoting *INS v. Cardoza-Fonseca, supra*, at 449)). Thus, given a choice of constructions, we are obliged to opt for the more narrow reading, i.e., the one that will less often result in removal.

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[5] We have recognized and applied this rule with approval in more than 30 precedent decisions issued since 1949. *See, e.g., Matter of Farias*, 21 I. & N. Dec. 269, 274 (BIA 1996; A.G., BIA 1997); *Matter of Tiwari*, 19 I. & N. Dec. 875 (BIA 1989); *Matter of Baker*, 15 I. & N. Dec. 50 (BIA 1974); *Matter of Andrade*, 14 I. & N. Dec. 651 (BIA 1974); *Matter of G-*, 9 I. & N. Dec. 159 (BIA 1960); *Matter of K-*, 3 I. & N. Dec. 575 (BIA 1949). In so doing, we have found consistently that questions of deportability must be resolved in the alien's favor. *Matter of Serna*, 20 I. & N. Dec. 579, 586 (BIA 1992); *Matter of Chartier*, 16 I. & N. Dec. 284, 287 (BIA 1977).

A. Statutory Language Defining a Conviction

We begin by looking at the language used by Congress in defining a "conviction" in section 101(a)(48)(A) of the Act. *See INS v. Cardoza-Fonseca, supra*, at 431; *INS v. Phinpathya, supra*, at 183, 189. Although we must rely on the plain language in the first instance, we may look to legislative history in order to determine whether there is a clear indication of contrary intent. *See INS v. Cardoza-Fonseca, supra*, at 433.

Both the respondent and the Service agree that the statutory language defining a conviction is plain. There is no disagreement that in enacting section 101(a)(48)(A), "Congress codified the *Ozkok* definition but eliminated its third prong." *Matter of Devison, supra*, at 10; *see also Lujan-Armendariz v. INS, supra*, at 742 ("Congress adopted verbatim the first two sub-parts of the Ozkok definition, while notably omitting the third."); *Matter of Roldan, supra*, at 8 (stating that "Congress definitively excised the third prong of *Ozkok*"); *cf. Matter of Ozkok, supra*.[6]

This reading is confirmed by the legislative history accompanying the enactment of section 322 of the IIRIRA, which expresses general approval of our approach in *Ozkok*, but adds that *Ozkok* "does not go far enough." *See* H.R. Conf. Rep. No. 104-828, at 224 (1996) ("Joint Explanatory Statement"). The statement explains that "by

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[6] The third prong of *Matter of Ozkok, supra*, at 552, states that a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge.

removing the third prong of *Ozkok*, [the new definition] *clarifies Congressional intent* that even in cases where adjudication is 'deferred,' the original finding or confession of guilt is sufficient to establish a 'conviction' for purposes of the immigration laws." *Id.* (emphasis added).

Nothing in either the statute or its legislative history addresses dispositions under the FFOA, adjudications under the FDJA, or subsequent expungements or vacations of judgment.[7] Rather, the plain language and legislative history indicate that Congress' enactment of a definition of a "conviction" was intended to modify our precedent in just one respect – to treat deferred adjudications as convictions at the time that a guilty plea is entered and a penalty is imposed.

In addition, at oral argument in this case, the Service conceded that there is a distinction between a deferred adjudication, which constitutes a conviction under section 101(a)(48)(A) of the Act, and an expungement of a conviction under a state rehabilitative statute such as existed in *Lujan-Armendariz*. The Service contended that "the Ninth Circuit did not find that [Lujan] was not convicted for purposes of 101(a)(48)(A)," so that "it's not a question of whether [the FFOA was] repealed [by] 101(a)(48)(A)," but "whether [the FFOA] even applies in the Immigration context."

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[7] In *Matter of Ozkok, supra*, at 552, we made clear that the definition of a conviction we adopted did not alter our preexisting rules relating to expungements. Nothing in the legislative history "expressly evince[s] any will on the part of Congress to include all vacated or expunged criminal convictions within the definition of a conviction" or to alter the way we and the courts have traditionally treated such convictions. *Matter of Roldan, supra*, at 25 (Villageliu, Board Member, dissenting).

This presents us with a question somewhat different from the issues on which the majority has focused. The appropriate question is: does the enactment of section 101(a)(48)(A) of the Act supersede our precedent relating to dispositions that could have been made under the FFOA?

1. Scope of Section 101(a)(48)(A) of the Act

In *Matter of Roldan, supra*, we construed the statutory language as necessarily indicating Congress' intent to brook no exceptions to the definition of a conviction. If the statute either expressly included language stating that a first offender disposition was a conviction or expressly foreclosed any exceptions to the definition of a "conviction," that would be the end of the matter. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., supra*, at 842-43.

However, the statute does not expressly state either that a first offender disposition constitutes a "conviction" or that the definition forecloses exceptions to its terms. *See* section 101(a)(48)(A) of the Act; *Matter of Roldan, supra*, at 20. Nor is there any general language suggesting Congress' intent to repeal or exclude the operation of any other federal statutes, such as might have been indicated by the phrase, "notwithstanding any other provision of law." *See, e.g., INS v. St. Cyr, supra*, at 2285-86 (noting that in the absence of language stating that the term applies regardless of whether the conviction was entered before, on, or after the date of enactment, the statute fails to "speak[] with sufficient clarity to bar jurisdiction"); *see also, e.g.*, IIRIRA § 321(b), 110 Stat. at 3009-628 (describing the effective date of the definition of

an aggravated felony by expressly excluding "any other provision of law").

It is axiomatic that Congress is deemed to be aware not only of prior interpretations of a statute, but also of preexisting case law when it acts. *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute."); 2A C. Sands, *Sutherland on Statutory Construction* § 49.09 (4th ed. 1973); *see also Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979) (emphasizing that "a distinguished panel of the Court of Appeals for the Fifth Circuit squarely decided this issue"). In enacting a statutory definition of the term "conviction," Congress demonstrated a detailed knowledge of existing judicial and administrative interpretations of the term in relation to immigration law violations. *See generally* Joint Explanatory Statement, *supra*, at 224. The presumption that Congress acted with such knowledge is particularly appropriate where Congress "exhibited both a detailed knowledge of the [incorporated] provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation." *Lorillard v. Pons, supra*, at 581.

Equally important, Congress is not presumed to change well-established legal precedent by silence. *American Hosp. Ass'n v. N.L.R.B.*, 499 U.S. 606, 613-14 (1991) ("If this amendment had been intended to place the importation limitation on the scope of the Board's rulemaking powers . . . we would expect to find some expression of that intent in the legislative history."). Congress did not devise a new definition of a conviction wholesale, but actually adopted the first two clauses of the existing administrative definition under which we had operated for

at least a decade. Moreover, the statute does not address either 18 U.S.C. § 3607 specifically or first offender dispositions generally. As was the case in *Lorillard v. Pons, supra*, Congress' selectivity in eliminating one particular element of our prior definition of a conviction "strongly suggests that but for those changes Congress expressly made, it intended to incorporate fully the [existing] remedies and procedures." *Id.* at 582.

When Congress wished to absolutely eliminate any exceptions to a statutory provision in the 1996 Act, it did so expressly. *See, e.g.*, section 242 of the Act, 8 U.S.C. § 1252 (Supp. II 1996) (relating to judicial review). "Had Congress intended to [exclude operation of the FFOA] by passing the new definition of conviction, it could easily have done so by express reference . . . or at the least by including a 'notwithstanding any other law' provision with respect to the new definition." *Lujan-Armendariz v. INS, supra*, at 747. Accordingly, Congress must be deemed to be aware of the FFOA and the 25-year history of its application in immigration proceedings.

2. Effect of 18 U.S.C. § 3607

Section 3607 of Title 18 specifies that in the case of an individual who is a first-time offender charged with possession of a controlled substance, including a youthful offender under 21 years of age, a disposition reached is "*not* . . . a *conviction* for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or *for any other purpose*." 18 U.S.C. § 3607(b) (emphasis

added).[8] In § 3607, Congress expressly provided an exception to the ordinary procedures and consequences that accompany a conviction for a controlled substance violation under 21 U.S.C. § 844, and made that exception available to a first-time offender.

Furthermore, convictions other than those mentioned explicitly under 21 U.S.C. § 844 are also covered. *See United States v. Barial*, 31 F.3d 216, 219 (4th Cir. 1994) (holding that first offender treatment under § 3607 is available to those found guilty of an offense *described in* § 844 even if the conviction is not *under* § 844). The rule that such dispositions may not be used "for any purpose" has been extended to similar state expungements. *See Lujan-Armendariz v. INS, supra*, at 743; *Matter of Manrique, supra*.

The majority seeks to rid itself of the problem of our past precedent in *Matter of Manrique* and prior decisions by reasserting arguments against the applicability of equal protection principles that the Service lost before the Ninth Circuit long before the statute was amended in 1996. *See, e.g., Garberding v. INS*, 30 F.3d 1187 (9th Cir. 1994) (rejecting a narrow administrative policy that only expungements under exact state counterparts to the FFOA would be recognized). However, Congress' use of the words "described in" in 18 U.S.C. § 3607(a) indicates that the

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[8] The ultimate disposition of a criminal charge under 18 U.S.C. § 3607 may take one of two forms. The first, limited to a first-time offender, involves prejudgment probation, which, if completed successfully, *does not constitute a judgment of conviction*. 8 U.S.C. § 3607(a). The second, applicable to a youthful offender, involves a disposition under § 3607(a) that is subject to expungement under 18 U.S.C. § 3607(c).

focus is not on whether the offense is prosecuted under federal or state law, but on the type of conduct involved. *United States v. Barial, supra*, at 218 (citing *United States v. Rivera*, 996 F.2d 993, 996 (9th Cir. 1993)). It is plain that Congress knew how to confine special probationary treatment to the actual violators of a referenced provision, as subsection (a) provides that special probation may be considered for those found guilty of an offense "described in" 21 U.S.C. § 844, while subsection (c) provides expungement only for recipients of special probation under the age of 21 who were found guilty of "an offense under" § 844. 18 U.S.C. § 3607. Where Congress has chosen different language in proximate subsections of the same statute, courts are obligated to give that choice effect. *Russello v. United States*, 464 U.S. 16, 23 (1983); *see also United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir.1972).

In *Garberding v. INS, supra*, the Ninth Circuit emphasized that it is not the fortuitous circumstance of jurisdiction, but whether the offense involves first time possession that would qualify for probationary treatment under the FFOA that should determine whether the exception applies. *Id. at* 1190; *see also United States v. Barial, supra*, at 217 (extending the FFOA exception to an offender found guilty of one count of marijuana possession and one count of cocaine possession and sentenced to 1 year of probation on each count). Distinctions resting on a local jurisdiction's treatment of such an offender "have no logical relation to the fair administration of the immigration laws or the so-called 'war on drugs'" and lack a fair and substantial relation to the object of the legislation. *Garberding v. INS, supra*, at 1191 (citing *Francis v. INS*, 532 F.2d 268, 272 (2d Cir. 1976)). Likewise, we rejected

arguments such as those now embraced by the majority when we opted to follow the rulings of the Ninth Circuit in *Garberding v. INS*, recognizing them to be consistent with federal policy concerns advocated by the Solicitor General not to deport first offenders. *Matter of Manrique, supra*, at 63 ("It is clear that the policy not to deport aliens treated as first offenders or youth offenders under state laws stems from the Solicitor General's recommendation in *Matter of Andrade*.").

The majority's suggestion that the respondent might not qualify under the FFOA, seconded by the concurring opinion, is equally unavailing.[9] *Matter of Manrique, supra*, provides that a first offender is not subject to deportation if: (1) he was "accorded rehabilitative treatment under a state statute" and (2) he "establishes that *he would have been eligible* for federal first offender treatment under the provisions of 18 U.S.C. § 3607(a) (1988) had he been prosecuted under federal law." *Id.* at 64. According to *Manrique*, state rehabilitative treatment has been accorded when "the court has entered an order pursuant to a state rehabilitative statute under which the . . . criminal proceedings *have been deferred pending successful completion of probation or the proceedings have been or will be dismissed* after probation." *Id.* (emphasis added).

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[9] The concurring opinion is self-contradictory, contending on the one hand that the court's analysis in *Lujan-Armendariz* was made without regard to the actual sentences imposed, but asserting on the other hand that the court considered limiting the effect of a conviction where a respondent was "required to serve a period of confinement" followed by probation. *Matter of Salazar*, 23 I. & N. Dec. 223, 236 (BIA 2002) (Holmes, concurring). In any event, it is of no effect here, where the respondent received only probation.

The operative language is that the offender who received state rehabilitative treatment "would have been eligible" for first offender treatment. Eligibility for federal first offender treatment is triggered by a first time offense for simple possession of a controlled substance. 18 U.S.C. § 3607(a). With due respect, treatment of a state disposition under this federal policy is not determined by examining the amount of the controlled substance the offender is charged with possessing, or the period of probation imposed. *Cf. Fernandez-Bernal v. INS, supra*, at 1316 ("Fernandez-Bernal could not have received FFOA expungement relief, because he was actually sentenced to two years of probation, *as well as a term in jail.*") (emphasis added). In this case, the respondent's offense was for a first time offense of simple possession and the disposition imposed under a state rehabilitative statute was only a period of probation. Consistent with our decision in *Matter of Manrique*, the charges against the respondent have been deferred pending her successful completion of probation, when they will be dismissed.

The definition of a conviction in the Act does not repeal the FFOA and does not even mention it. *Lujan-Armendariz v. INS, supra*, at 743. In general, repeal by implication is not favored and may be found only where two statutes are in irreconcilable conflict or where one statute entirely displaces another. *Id.* at 743 (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)); *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (stating that "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable"); *see also Ysleta Del Sur Pueblo v. Texas*, 36 F.3d 1325, 1335 (5th Cir. 1994) (affirming that in the absence of a clear intention otherwise, a specific statute

will not be controlled or nullified by a general one, regardless of the priority of enactment) (citing *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 442-45 (1987)); *Ardestani v. INS*, 904 F.2d 1505, 1513 (11th Cir. 1990) (finding no conflict between a provision to remove common law and sovereign immunity barriers and earlier provisions barring fee shifting), *aff'd*, 502 U.S. 129 (1991).

There is no irreconcilable conflict merely because two statutes compel different results. *Radzanower v. Touche Ross & Co., supra*, at 155. If the statutes are capable of coexistence, each must be given effect. *Lujan-Armendariz v. INS, supra*, at 744. Accordingly, both statutes can be preserved and given effect by continuing to treat a disposition under the FFOA or a state rehabilitative statute as a narrow exception that does not frustrate the broad purposes of the definition of a conviction under section 101(a)(48)(A) of the Act. *Id.* at 745; *Matter of Manrique, supra*.

B. Exceptions to a "Conviction"

The majority appears to ignore both the historical context and current circumstances in which we have found narrow exceptions to the presence of a conviction. Notably, as a general rule, we have treated the expungement of a controlled substance conviction as being *ineffective* to overcome the fact of a conviction for immigration purposes for more than 40 years. *Matter of A-F-, supra*. At the same time, for more than 25 years, we also have recognized that "Congress expressed its intent to rehabilitate the individual user of drugs. This policy has been considered to be of equal importance to the congressional policy to deport narcotics offenders." *Matter of Deris*, 20 I. & N. Dec. 5,

9-10 (BIA 1989) (emphasis added) (footnote omitted) (citing *Matter of Werk, supra*, at 236). The distinction between these two policy interpretations culminated in our decision in *Matter of Manrique, supra*, and Congress is deemed to be aware of such historical exceptions.

Moreover, since our decision in *Matter of Roldan, supra*, we have identified exceptions to the statutory definition of a conviction under section 101(a)(48)(A) of the Act. Despite the attempts of the majority to minimize these precedents, their content contradicts the position of the majority that such exceptions are inapposite to the proper construction of section 101(a)(48)(A). The majority does not explain how it can find that some of our precedents, such as *Matter of Manrique*, are subject to implied repeal, but conclude that other longstanding interpretations continue in force.

For example, in *Matter of Devison, supra*, we ruled that an adjudication of youthful offender status under New York state law does not constitute a conviction under section 101(a)(48)(A) of the Act. *Id.* at 15. In reaching this conclusion, we recognized that "the standards established by Congress, as embodied in the FJDA, govern whether an offense is to be considered an act of delinquency or a crime." *Id.* at 5. We found that the New York state procedure at issue in *Devison* was "sufficiently analogous" to the federal provision to classify the adjudication as a determination of delinquency rather than a conviction for a crime. *Id.* at 8. We concluded that "there is no indication that Congress intended to include acts of juvenile delinquency within the meaning of the term 'conviction.'" *Id.* at 10. Citing several decades of precedent opinions, we presumed that "Congress was aware of our long-established policy and of the FJDA provisions that maintain a distinction

between juvenile delinquencies and criminal convictions." *Id.*

The majority attempts to rationalize its blatantly contradictory rulings by asserting that a youth offender adjudication is really not a conviction – and therefore not in need of an exception to prevent it from being deemed a conviction. The majority emphasizes that once the decision to treat the defendant as a youthful offender is made, the conviction is automatically vacated. But, it still existed, i.e., a plea was taken and a penalty imposed, just as contemplated under section 101(a)(48)(A) of the Act. An FFOA adjudication is hardly different.

In *Matter of Devison, supra*, we examined a state rehabilitative provision, compared it to a federal statute exempting such a disposition from being considered a conviction, and concluded that there was sufficient similarity that an adjudication under the state provision should not be deemed a conviction under section 101(a)(48)(A) of the Act. In *Matter of Manrique, supra*, we looked to a state rehabilitative provision and concluded that if the offender could have been prosecuted under the FFOA, the state provision was sufficiently analogous to the FFOA not to constitute a conviction for any purpose. *See* 18 U.S.C. § 3607(b). The majority's refusal to acknowledge either that section 101(a)(48)(A) of the Act can accommodate exceptions, or that the respondent's deferred adjudication under a state rehabilitative scheme constitutes such an exception, cannot be reconciled with *Matter of Devison*.

In *Matter of Devison, supra*, at 11, we also emphasized that it was our "consistent policy, expressed in *Ozkok* as well as in *Punu* and *Roldan*" that a single, federal standard should govern. We concluded "that the determination

of what constitutes a conviction for purposes of federal immigration law should not depend on the classifications assigned by different state laws to adjudications subject to rehabilitative provisions." *Id.* Accordingly, we found it appropriate to "continue to apply a federal standard, analyzing state juvenile or youthful offender proceedings against the provisions of the FJDA." *Id.* at 12.

Now, the majority unabashedly contradicts its own position, acknowledging that its holding will result in inconsistent applications of the statute and a lack of uniformity. *Matter of Salazar*, 23 I. & N. Dec. 223, 229 (BIA 2002) ("Although this federal definition . . . raises the possibility that uniform results may not be accorded . . . Congress clearly chose not to provide otherwise."). By contrast, in rationalizing the decision it reached in *Matter of Roldan*, the majority emphasized that Congress' intent in introducing the definition of a conviction was to achieve uniformity. *Id.* at 229-30 (citing Joint Explanatory Statement, *supra*, at 224). Indeed, the Conference Report plainly indicates that the intent in eliminating the third prong of the *Ozkok* decision is to avoid having to fall back on the "myriad of provisions for ameliorating the effects of a conviction." Joint Explanatory Statement, *supra*, at 224.

This confused position does not support the conclusions reaffirmed by the majority. Contrary to the position taken by the majority in this instance, the statute can accommodate exceptions and the Service has admitted as much. *See Lujan-Armendariz v. INS*, *supra*, at 746-47 ("The INS concedes, and we agree, that Congress did not intend that a conviction subsequently overturned on the merits (either because of a finding of insufficient evidence or because of a basic procedural inadequacy, such as a violation of the right to counsel), could serve as the basis

for deportation."). However, the majority persists in arguing that in the absence of an express statement from Congress, section 101(a)(48)(A) of the Act forecloses any exceptions.

The conclusion that section 101(a)(48)(A) of the Act leaves no room for exceptions to its terms based on state statutes proves to be an overstatement. *See Matter of Roldan, supra*, at 20 ("We find no room in the present statutory scheme for recognizing state rehabilitative actions. . . ."). *But see Lujan-Armendariz v. INS, supra*, at 747 ("Because the limitation is required by virtue of the provisions of the statute itself, we do not simply create a statutory exception, but rather implement the Congressional intent [to accommodate exceptions] implicit in the statute's terms."). Indeed, we have implemented some of these exceptions in both *Matter of Devison, supra*, and *Matter of Rodriguez-Ruiz, supra*.

Even if we were to construe the language in section 101(a)(48)(A) as "silent" in relation to whether 18 U.S.C. § 3607 and comparable state provisions apply in immigration proceedings, the conclusion in *Matter of Roldan* that the statute allows for no exceptions in relation to the FFOA is not a permissible one. Such a conclusion requires us to infer that section 101(a)(48)(A) repeals the FFOA, at least insofar as it applies in immigration proceedings. By contrast, additional support for the view that "Congress did not intend to bar any and all exceptions to the new definition's literal terms can be found in its failure to provide any indication in the immigration statute that the new law was intended to displace the Federal First Offender Act." *Lujan-Armendariz v. INS, supra*, at 747. "Had Congress intended to partially repeal the Act by passing the new definition of conviction, it could easily have done

so by express reference to the Act, or at the least by including a 'notwithstanding any other law' provision with respect to the new definition." *Id.; see also Matter of Devison, supra.*

III. CONCLUSION

Section 101(a)(48)(A) of the Act does not preclude the operation of the FFOA in immigration proceedings. The federal first offender statute remains in force and expressly provides that a disposition under that section is not to be considered a conviction *"for any . . . purpose."* 18 U.S.C. § 3607(b) (emphasis added); *see also INS v. St. Cyr, supra*, at 2278-79 ("Implications from statutory text or legislative history are not sufficient to repeal [an existing statutory provision]."). Under these circumstances, the statutory definition of a "conviction" continues to leave room for an "exception" where an alien accorded rehabilitative treatment under a state statute establishes that she would have been eligible for first offender treatment under the FFOA. *Matter of Manrique, supra.*

In light of these conclusions, I would find that the respondent is not removable under sections 237(a)(2)(B) or 237(a)(2)(A)(iii) of the Act. Therefore, although I recognize that the Fifth Circuit has indicated that its interpretations in federal sentence enhancement proceedings apply equally to immigration cases, I do not find it necessary to reach the second issue addressed by the majority. I conclude that the respondent should not be deemed to have been convicted and, accordingly, I dissent.

DISSENTING OPINION: Anthony C. Moscato, Board Member, in which Gustavo D. Villageliu, Board Member, joined

I respectfully dissent.

The central question in this case is whether the Congress of the United States, in rewriting the definition of a conviction in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"), eliminated the Federal First Offender Act, 18 U.S.C. § 3607 (2000) ("FFOA"), as a factor in immigration proceedings. The majority chooses not to decide that issue, but to reject the decision of the United States Court of Appeals for the Ninth Circuit in *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), that state court convictions for crimes that *would have been* amenable to treatment under the FFOA should not be considered "convictions" under the IIRIRA. The dissent of Board Member Rosenberg seeks to recognize the viability of the FFOA, absent its specific elimination from immigration proceedings, as a narrow preexisting exception to the definition of a conviction in the IIRIRA – and goes on to argue that the Ninth Circuit was correct in extending that exception to state court convictions.

I write separately to emphasize what I believe to be the most important reason to dissent from the majority opinion in this case, which is that the majority fails to fully recognize the *profound* importance of the congressional policy choice that supports and animates the Federal First Offender Act.

This country has long been engaged in what has often been characterized as a "war" against both the threat and the reality of illegal drug use by our people, especially our youth. Over the past decades, we have seen a constantly increasing allocation of money and authority designed to

stop the importation, sale, and use of illegal drugs in the United States. Over and over again, at both the federal and state levels, statutes prohibiting the importation, sale, and use of such drugs have been made more severe, and law enforcement officials have been granted ever-increasing authority to proceed against both traffickers and users as this nation has sought to use every resource at its command to stop or slow the use of illegal drugs. Yet in the midst of this battle to achieve a goal shared by virtually all Americans, in the midst of the increasing severity of that effort, the Federal First Offender Act – which provides relief from the criminal consequences of a first drug use conviction under certain circumstances – was both passed and maintained in force by the United States Congress. We might reasonably ask why, considering that its passage and preservation would appear to be so at odds with the prevailing logic and structure of our governmental efforts in this area.

The answer may not, in the end, be as counterintuitive as it seems. While we recognize, as both a nation and a government, the significant threat that illegal drugs pose to our way of life, we also recognize that people sometimes make mistakes, and that they sometimes do silly and stupid and foolish and self-destructive things, especially the young among us. The FFOA is a careful and limited attempt on the part of Congress to recognize, amid the maelstrom of counternarcotic and antidrug efforts, that a single ill-advised act, where it relates to drug use and not drug importation, trafficking, or sale, should not necessarily destroy a life. It also recognizes the reality of illegal drug use across the depth and breadth of our society and seeks in some measured way to recognize and respond to that reality while maintaining a fierce and

intractable opposition in all other ways. It is, in the end, a uniquely American balancing of hopes and goals, values and ideals.

Most of those affected by this case and these statutes are lawful permanent residents; they are individuals who, although not citizens, have been accepted in some sense into the body politic of this nation and have been granted a legal basis for their continued presence in the United States. They are subject to deportation or removal solely because of their conviction for a first-time drug use offense. If the Congress has been willing to maintain the relief inherent in the FFOA for citizens of the United States, even in the face of its own extraordinary counternarcotic and antidrug efforts, it seems reasonable to conclude that it also intended to maintain that relief for those granted lawful permanent resident status in the United States, notwithstanding the increases in severity contained within the IIRIRA's provisions. In the absence of a specific and explicit elimination of the FFOA in immigration proceedings, I am forced to so conclude.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Harlington, Texas

File No.: A 24 384 420 February 22, 1999

In the Matter of	)	
LAURA ESTELLA SALAZAR-REGINO,	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGES: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act – Convicted of an aggravated felony; Section 237(a)(2)(B)(i) of the Immigration and Nationality Act – Convicted of a law relating to a controlled substance.

APPLICATIONS: Motion to Terminate

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Jodi Goodwin, Attorney 815 Ridgewood Brownsville, Texas 78520	Diane Bernstein, Attorney Immigration and Naturalization Service P.O. Box 1711 Harlington, Texas 78551

ORAL DECISION OF THE IMMIGRATION JUDGE

(Received Apr. 30, 2005)

The respondent is a 28-year-old female, native and citizen of Mexico who entered the United States at or near Texas on or about May 14, 1977 as a non-immigrant visitor. Subsequently, she adjusted her status to that of a lawful permanent resident on May 7, 1981. On July 7, 1997, she was convicted in the 344th Judicial District

Court of Chambers County, Texas for the offense of possession of a controlled substance, a felony under the Texas Penal Code. Removal proceedings were commenced with the issuance of a Notice to Appear dated July 27, 1998. The respondent had admitted the allegations of fact one, two, three and four but denied allegation number five. Based on the conviction documents submitted by the Immigration and Naturalization Service, to-wit, Group Exhibit 2, the Court finds that allegation number five has been established. The Court finds that the respondent has been convicted of a law relating to a controlled substance, thus, the respondent is subject to being removed from the United States as pursuant to Section 237(a)(2)(B)(i). The Court finds that the respondent is not subject to be removed from the United States as an aggravated felon as stated under Section 237(a)(2)(A)(iii). Under 21 U.S.C. 844(a), a person who has been convicted of simple possession under the federal scheme, it is deemed a misdemeanor and not a felony, although the respondent has been convicted under a state felony, the similar offense under a federal law would have been considered a misdemeanor. Thus, the Court finds that the respondent had not been convicted of an aggravated felony and that in *Matter of L-G-* as controlling on the issue.

The respondent had requested the case be terminated as a matter of policy under *Matter of Monriques*, Int. Dec. 3250. In *Matter of Monriques,* aliens where have been convicted of a law relating to a controlled substance on a first time basis and then placed on a rehabilitative treatment pursuant to a state statute, will not be deported if he or she establishes that he would have been eligible for first offender's treatment under 18 U.S.C. 3607(a). The case at bar, the respondent has established that she is a first

offender and has not previously been convicted of violating any federal laws or state laws relating to controlled substance: That she plead guilty to the offense of simple possession of a controlled substance; that she has not previously been accorded first offender's treatment under any laws; and that the Court entered an order pursuant to a State rehabilitative statute under any law; and that the Court entered an order pursuant to a State rehabilitative statute under which the respondent's criminal proceedings have been deferred pending successful completion of the probation, Thus, the Court finds that the respondent has met the requirements under *Matter of Monriques* and thus the proceedings should be terminated.

The Court further finds that the respondent has not been convicted of an aggravated felony and if respondent had not qualified under *Matter of Monriques,* that she would have qualified for cancellation of removal under Section 240(A) of the Immigration and Nationality Act, it being unnecessary for her to submit the application for cancellation of removal in light of alternative relief under *Matter of Monriques.*

ORDER

IT IS THE ORDER OF THE COURT that these proceedings be terminated for the reasons aforementioned.

/s/ David Ayala
DAVID AYALA
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before Immigration Judge DAVID AYALA in the matter of:

LAURA ESTELLA SALAZAR-REGINO

A 24 384 420

Harlington, Texas

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Jane Simpson
(JANE C. SIMPSON,
Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

April 20, 1999
(Completion Date)

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A39 287 965 – Los Fresnos Date:

In re: NOHEMI RANGEL RIVERA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se[1]

ON BEHALF OF SERVICE: Thomas M. Bernstein
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)]
Convicted of controlled substance violation

APPLICATION: Cancellation of removal

(Received Dec. 23, 2002)

ORDER:

PER CURIAM. The Immigration and Naturalization Service is appealing from the May 11, 1999, decision of an Immigration Judge granting the respondent's application for cancellation of removal under section 240A(a) of the

[1] We acknowledge that Lionel Perez, Esquire, has filed an appeal brief on the respondent's behalf. He did not, however, file a Form EOIR-27, Notice of Entry of Appearance Before the Board of Immigration Appeals, along with the brief and, thus, we cannot officially recognize Mr. Perez as the respondent's counsel. Nevertheless, we will serve Mr. Perez with a courtesy copy of this decision.

Immigration and Nationality Act, 8 U.S.C. § 1229b(a), and terminating removal proceedings. The respondent agrees with the Immigration Judge's decision. *See* Respondent's Appeal Brief. The appeal will be sustained.

The Service charged the respondent with removability under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i) (conviction for a controlled substance violation). Such charge was based upon the respondent's guilty plea to felony possession of marijuana under section 481.121 of the Texas Penal Code in a Texas state court. The respondent was sentenced to 6 years community supervision and was granted "deferred adjudication" under Texas law. *See* Record of Conviction.

We find that the Service's appeal must be sustained based upon intervening Board case law since the Immigration Judge rendered his decision. The respondent's March 1999 deferred adjudication after a plea of guilty to possession of a controlled substance, to wit, marijuana, constitutes a "conviction" for immigration purposes. Such finding is controlled by our decision in *Matter of Punu,* 22 I&N Dec. 224 (BIA. 1998). In addition, we find that the respondent's state felony conviction constitutes an aggravated felony for immigration purposes under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii). This issue is now clearly controlled by recent precedent decisions issued by this Board. *Matter of Santos-Lopez,* 23 I&N Dec. 419 (BIA 2002); *Matter of Yanez-Garcia,* 23 I&N Dec. 390 (BIA 2002) (citing *Hinojosa-Lopez v. INS,* 130 F.3d 691 (5th Cir. 1997), *cert. denied,* 122 S. Ct. 305 (2001)).

Accordingly, the respondent is statutorily ineligible for cancellation of removal. Section 240A(a)(3) of the Act.[2]

In light of the foregoing, the Service's appeal is sustained.

FURTHER ORDER: The Immigration Judge's decision granting the respondent's application for cancellation of removal and terminating removal proceedings is hereby vacated.

FURTHER ORDER: The respondent is ordered removed to Mexico.

/s/ Neil P. Miller
FOR THE BOARD

[2] Inasmuch as the respondent is statutorily ineligible for the relief from removal she seeks, we need not address the issue raised by the Service on appeal, to wit, whether the respondent was deserving of such relief in the exercise of discretion. *See* Service's Appeal Brief.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Los Fresnos, Texas

File No.: A 39 287 965 May 11, 1999

In the Matter of	)	
NOHEMI RANGEL-RIVERA,	)	IN REMOVAL PROCEEDINGS
Respondent	)	

CHARGES: Section 237(a)(2)(b)(i), Immigration and Nationality Act

APPLICATION: Section 240A(a), Immigration and Nationality Act.

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Lionel Perez, Esquire	Thomas M. Bernstein, Esquire Assistant District Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

(Received Jul. 21, 1999)

STATEMENT OF THE CASE

The Immigration Service issued a Notice to Appear with respect to respondent on March 17, 1999, and properly served it upon her. (Exhibit 1). The Notice to Appear alleges that respondent is not a citizen or national of the United States, and that she is a native and citizen of Mexico who was admitted to the United States at Brownsville, Texas, on or about May 31, 1985, as an immigrant. It was further alleged that on March 9, 1999, respondent was convicted in the 105th Judicial District Court of Texas, at Cleburne County, Texas, for the offense of possession of

marijuana. It is charged in the Notice to Appear that respondent is subject to removal under Section 237(a)(2)(B)(i) of the Immigration and Nationality Act (the Act). Respondent, through her attorney of record, has admitted all four allegations of fact in the Notice to Appear and conceded removability as charged. Based upon the pleadings, the Court finds that removability has been established by clear and convincing evidence in this case.

Respondent selected Mexico as the country for removal if that were to become necessary. Respondent has applied for cancellation of removal under Section 240A(a) of the Act. Respondent filed her Application for Cancellation of Removal along with supporting documentation. (Exhibit 2, Group Exhibit 3, and Exhibit 4). The hearing with respect to the Application for Cancellation was held on May 11, 1999.

STATEMENT OF THE FACTS AND CONCLUSIONS OF LAW

In order to be eligible for cancellation of removal under Section 240A(a) of the Act, respondent must show that she has been an alien lawfully admitted for permanent residence for not less than five years; that she has resided in the United States continuously for seven years after having been admitted in any status; and that she has not been convicted of any aggravated felony. Even if respondent proves that she is eligible for cancellation of removal, the Court must still decide whether she should be granted that relief in the exercise of the Court's discretion. In *Matter of C-V-T-*, Int. Dec. 3342 (BIA 1998), the Board of Immigration Appeals set forth the factors that the Court should consider in determining whether to grant cancellation of removal for permanent residents. The

Court has carefully considered that decision and will apply the relevant criteria to the facts of this case.

The Court concludes that the respondent was a credible witness in this removal proceeding. Her testimony was forthright, internally consistent, and consistent with the documentary evidence that she presented. Although the respondent did not express herself very well in this proceeding, it appears that she was sincere in her responses.

The Court concludes the respondent has shown that she is eligible to be considered for a discretionary grant of cancellation of removal. The record shows that she has been admitted to the United States as a permanent legal resident since May 31, 1985. The record also shows the respondent has resided continuously in the United States since that date. Therefore, respondent has demonstrated that she has been an alien lawfully admitted for permanent residence for more than five years and that she has resided in the United States continuously for more than seven years, after having been admitted as a permanent legal resident. Further, the record demonstrates the respondent has not been convicted of any aggravated felony. The only criminal conviction that she has is the conviction that was alleged in the Notice to Appear in this case for the possession of marijuana. Since it is her first conviction for possession of a controlled substance, it would be a misdemeanor under the Controlled Substances Act, and, therefore, is not an aggravated felony within the meaning of Section 101(a)(43)(5) of the Act.

With respect to the discretionary considerations, the Court concludes that respondent's criminal conviction is a very serious adverse discretionary factor. Respondent was

convicted of possessing more than 50 pounds but less than 2000 pounds of marijuana. The record does not reflect exactly the amount of marijuana involved. Respondent testified that she was told, prior to attempting to transport the marijuana, that there was 45 pounds of marijuana in the vehicle. The indictment to which respondent pled nolo contendre states that it was more than 50 pounds of marijuana. Respondent testified that she was never told thereafter the amount of marijuana that was actually in the vehicle. In any event, whatever the amount, it was more than 50 pounds, which was a very large quantity of marijuana. Further, respondent testified that she was attempting to transport this marijuana from Harlingen, Texas, to Alabama, where it would be delivered based upon instructions that she would receive after calling by telephone a person that she was supposed to contact. Therefore, it is clear that the respondent was trafficking in a very large amount of marijuana. Further, she was engaging in this conduct for financial gain. She testified that she engaged in this criminal conduct because she needed money in order to support herself and her children and that she was to be paid between 4,000 and 5,000 dollars. She testified that an unspecified amount of that money would be paid to the person who was accompanying her on the trip to Alabama, Maria Elena Carmona.

The Court concludes that this criminal conduct becomes even more of a serious adverse factor when it is considered that respondent took her two youngest children on the trip to Alabama with her. At that time those children were three years old and one year old, respectively. Respondent testified that she understood that she was engaging in conduct that could lead to danger, but that she was willing to take that risk. She also testified that she

took her children with her because she believed that it would be less likely for her to be arrested if she were with her children at the time. There are no other significant adverse discretionary factors of record in this case.

With respect to respondent's equities in the United States, the Court finds the respondent has outstanding equities in this country. She has been in the United States since her early teenage years. It is somewhat unclear from the record exactly when she started living in the United States, however, apparently, it was before she became a permanent legal resident. She testified that she began living in the United States in 1982 or 1983; however, the documentary evidence which includes letters from her family, indicates that it was approximately 1984. In any event, even if it was 1984, respondent has been living continuously in the United States for the last 15 years, since age 13 or 14. She is now 28 years of age.

Further, respondent's close family ties are all in the United States. She has three United States citizen children, her two parents ~~who~~ are permanent legal residents, and five siblings, three of whom are United States citizens and two are permanent legal residents. Respondent lives with her parents and two of her siblings, as well as her three children. It is noted that now that respondent has been detained by the Immigration Service, the three children are living with her husband, from whom she is separated. He also lives in Harlingen, Texas, as does the respondent. All of the respondent's siblings live in Harlingen, Texas, or in close proximity.

With respect to other favorable discretionary factors, it is noted that respondent has been employed in the United States for most of the time that she has been in

this country. She also has presented a letter showing that she would at least be given part-time employment, if she were allowed to remain in the United States. (Exhibit 4).

With respect to the question of rehabilitation, it is noted that respondent's offense for possession of marijuana was very recent and serious. Respondent has not, at the present time, demonstrated rehabilitation, because the Court does not believe that there has ~~not~~ been enough time for that determination to be made. The Court does note, however, that the respondent's offense was a first offense. As stated, respondent did not express herself very well in her testimony. She did testify, however, that she would never do it again because of her children, and she does not want to go to jail. It is noted that, with respect to her conviction, respondent was given a deferred adjudication and placed on six years of community supervision. Respondent was emotionally distraught in this removal proceeding regarding her testimony at the hearing on May 11, 1999. It appeared the respondent was emotionally distraught because of the potential consequences of this proceeding. From the record and viewing respondent's testimony, it does not appear to the Court that respondent will engage in such conduct in the future.

With respect to the question of any hardship that respondent and her family would suffer if she were removed to Mexico, again, the Court ~~does not~~ believes the respondent did not express herself very well with respect to her feelings about removal. However, the Court believes that her demeancr during her testimony, which was that of being distraught and in tears most of the time, indicates the respondent does take this proceeding very seriously and has a great dread about the consequences of being removed.

The letters from respondent's parents and siblings show that they would suffer hardship if respondent were to be removed, because they do have a close relationship with respondent. Further, the record indicates that respondent, if removed, would be alone in Mexico, except that she may be able to live with her aged grandparents. However, it appears the respondent may well have to go to Mexico without her children. At this time she is separated from her husband, and there is no agreement as to the custody of the children. The children were living with respondent until her arrest. They are now living with her husband. Respondent testified that she would take the children with her to Mexico if she were removed. However, she testified that she does not believe that her husband would agree to this although she has never discussed it with him. She testified that she believes that he would fight for the right to keep the children in the United States with him. Respondent's testimony appears to be reasonable in light of the fact that the children are now living with him; therefore, he is willing to take responsibility for them. Apparently he lives at his mother's house. It appears likely that he would be able to win custody of the children if respondent were to be removed, based upon respondent's criminal conviction, and the fact that the children have lived their lives in the United States, and being with their mother would cause them to have to live in Mexico. Therefore, it appears that if respondent were removed from the United States, she would lose the custody of her children. She has no close family ties in the [sic] Mexico; as stated, her maternal grandparents live there, however, they are, according to respondent, in their 80's and 90's, respectively, and she has not seen them in some time.

Based upon all of the above, the Court concludes that the sum total of respondent's equities in the United States, the favorable discretionary factors of her work history, the Court's conclusion that it does not appear that she will engage in drug trafficking in the future, and the hardship to the respondent and her family if she is removed from the United States outweigh on her balance, the serious adverse discretionary factors of criminal conduct and the fact that she put her children at risk during that criminal conduct. Therefore, the Court believes that on the facts of this case, the respondent's Application for Cancellation of Removal under Section 240A(a) of the Act should be granted in the exercise of the Court's discretion.

ORDER

IT IS HEREBY ORDERED that respondent's Application for Cancellation of Removal under Section 240A(a) of the Act be granted.

IT IS FURTHER ORDERED that this removal proceeding be terminated.

Dated this 11th day of May, 1999.

Approved as to content only.

/s/ Howard Achtsam
HOWARD ACHTSAM
Immigration Judge
7/21/99

CERTIFICATE PAGE

I hereby certify that the attached proceeding before HOWARD ACHTSAM, in the matter of:

NOHEMI RANGEL-RIVERA

A 39 287 965

Los Fresnos, Texas

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ Yvonne A. Branden
(Yvonne A. Branden, Transcriber)

Deposition Services, Inc.
6245 Executive Boulevard
Rockville, Maryland 20852
(301) 881-3344

July 18, 1999
(Completion Date)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-41492

LAURA ESTELA SALAZAR-REGINO

Petitioner-Appellant

v.

E M TROMINSKI, District Director, INS;
ALBERTO R GONZALES, US Attorney General

Respondents-Defendants

TEODULO CANTU-DELGADILLO

Petitioner-Appellant

v.

E M TROMINSKI, District Director, INS; ALBERTO R GONZALES, US Attorney General

Respondents-Defendants

DANIEL CARRIZALES-PEREZ

Petitioner-Appellant

v.

AARON CABRERA, Acting Director, INS, Acting Director HLG/DO; ALBERTO R GONZALES, Attorney General of the United States

Respondents-Defendants

MANUEL SANDOVAL-HERRERA

Petitioner-Appellant

v.

AARON CABRERA, Acting Director, INS;
ALBERTO R GONZALES, Attorney General of the United States

Respondents-Defendants

RAUL HERNANDEZ PANTOJA

Petitioner-Appellant

v.

ALBERTO R GONZALES, US Attorney General;
CHARLES ARENDALE, Acting Director

Respondents-Defendants

JOSE MARTIN OVIEDO-SIFUENTES

Petitioner-Appellant

v.

CHARLES ARENDALE, Acting Director; ALBERTO R GONZALES, US Attorney General

Respondents-Defendants

CESAR LUCIO

Petitioner-Appellant

v.

CHARLES ARENDALE, Acting Director ALBERTO R GONZALES, US Attorney General

Respondents-Defendants

PRAXEDIS RODRIGUEZ

Petitioner-Appellant

v.

AARON CABRERA; ALBERTO R GONZALES, US Attorney General

Respondents-Defendants

NOHEMI RANGEL-RIVERA

Petitioner-Appellant

v.

AARON CABRERA; ALBERTO R GONZALES

Respondents-Appellees

Appeal from the United States District Court for the Southern District of Texas, Brownsville

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ON PETITION FOR REHEARING EN BANC

(Filed Sep. 27, 2005)

(Opinion 6/30/05, 5 Cir., ___, ___ F.3d ___)

Before JOLLY, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

PERTINENT STATUTES

TITLE 8. ALIENS AND NATIONALITY
CHAPTER 12. IMMIGRATION AND NATIONALITY
GENERAL PROVISIONS

§1101. Definitions

(a)

(43) The term "aggravated felony" means –

. . .

(B) illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act [21 USCS § 802]), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code);

. . .

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I. CRIMES
CHAPTER 44. FIREARMS

§924 Penalties.

. . .

(c)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime –

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection –

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall –

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law –

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).